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OF THE

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Names of Justices, and Whence Appointed	By Whom Appointed	Circuits (28 USCS § 41)	Commissioned	Sworn In
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Associate Justice THURGOOD MARSHALL, New York	President Johnson	Second Conn., N. Y., Vt.	1967 (Aug. 30)	1967 (Oct. 2)
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Associate Justice BYRON R. WHITE, Colorado	President Kennedy	Tenth Colo., Kan., N. M., Okla., Utah, Wyo.	1962 (Apr. 12)	1962 (Apr. 16)
Associate Justice ANTHONY M. KENNEDY, California	President Reagan	Eleventh Ala., Fla., Ga.	1988 (Feb. 11)	1988 (Feb. 18)

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MISCELLANEOUS PROCEEDINGS

April 15, 1991

ORDER APPOINTING DEPUTY CLERK OF SUPREME COURT

It is ordered that William V. Gullickson be, and he is hereby, appointed Deputy Clerk of this Court, effective April 15, 1991.

CASES ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1990

VOLUME 499 US (pp 1–end)

†

[499 US 1]

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Petitioner

v

CLEOPATRA HASLIP et al.

499 US 1, 113 L Ed 2d 1, 111 S Ct 1032

[No. 89-1279]

Argued October 3, 1990. Decided March 4, 1991.

Decision: Alabama punitive damages award against insurance company for alleged agent's fraud in lapse of health insurance held not to violate due process under Federal Constitution's Fourteenth Amendment.

SUMMARY

An individual was an Alabama-licensed agent for two insurance companies which were distinct and nonaffiliated entities. The first company wrote life insurance, but not group health insurance for municipalities; the second company wrote such group health insurance. The individual, presenting himself as an agent of the first company, (1) solicited an Alabama city for both life and health insurance for the city's employees; (2) prepared separate applications for (a) life insurance with the first company, and (b) health insurance with the second company; and (3) submitted the initial premium payments to the insurers with the applications. Later health premium payments were supposed to be effected through payroll deductions and the city clerk's issuance of checks to the individual, but the individual allegedly misappropriated most of the payments. The second company then sent notices of lapsed health coverage to city employees in care of the individual and of another person who was in charge of an Alabama office of the first company, but those notices were not forwarded to the employees. Several city employees eventually (1) filed suit in the Circuit Court for Jefferson County, Alabama against the first company and the individual, but not against the second company; (2) alleged that the individual had collected premiums but failed to remit them, so that the employees' health insurance policies had supposedly lapsed without their knowledge; and (3) claimed damages for fraud. The trial court found that the employees did not know that their health policies had been canceled, and the case against the first company was submitted to the jury under (1) a theory of respondeat

Briefs of Counsel, p 743, infra.

superior; and (2) instructions to the effect that if the jury determined that there was liability for fraud, then the jury could award punitive damages. The jury returned general verdicts for the employees against both the first insurance company and the individual. The largest such award—$1,040,000 in favor of one employee—may have contained a punitive damages component of not less than $840,000. On appeal by the first company, the Supreme Court of Alabama, in affirming, expressed the view that (1) punitive damages were recoverable in Alabama for deceit or willful fraud; (2) on the evidence in the case at hand, the jury could not have concluded that the individual's misrepresentations were made either innocently or mistakenly; and (3) the punitive damages award did not violate the due process clause of the Federal Constitution's Fourteenth Amendment (553 So 2d 537). The first company then petitioned for certiorari.

On certiorari, the United States Supreme Court affirmed. In an opinion by BLACKMUN, J., joined by REHNQUIST, Ch. J., and WHITE, MARSHALL, and STEVENS, JJ., it was held that—even if the punitive damages award in the case at hand was more than 4 times the amount of compensatory damages, was more than 200 times the out-of-pocket expenses of the employee who was awarded the largest amount, and was much in excess of the fine that could be imposed for insurance fraud under the state's statutes—the punitive damages award against the first insurance company did not violate the Fourteenth Amendment's due process clause, because (1) the record amply supported the conclusion that the individual was acting as an agent of the first company when he defrauded the plaintiff city employees; (2) imposing punitive damages liability upon the first company under the doctrine of respondeat superior did not, under such circumstances, violate the company's due process rights; (3) the traditional, common-law approach of awarding punitive damages—under which approach the amount of the award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar conduct, and the jury's determination is then reviewed by trial and appellate courts to insure that the determination is reasonable—is not so inherently unfair as to deny due process and to be unconstitutional per se, where the common-law approach was well established before the Fourteenth Amendment was enacted; (4) the particular punitive damages award in the case at hand did not cross the line into constitutional impropriety, for, while the monetary comparisons were wide and might be close to the line, imprisonment as well as a fine could be required in the criminal context, and the award in the case at hand did not lack objective criteria, where (a) the jury had been adequately instructed, (b) the trial court had conducted a postverdict comparison that conformed with the then-applicable Alabama standards, and (c) the company had received the benefit of appropriate appellate review by the Alabama Supreme Court; and (5) even though there was much to be said in favor of a higher standard of proof of punitive damages, the lesser Alabama standard of "reasonably satisfied from the evidence," when buttressed by such procedural and substantive protections, did not violate due process.

SCALIA, J., concurring in the judgment, expressed the view that (1) it had

been the traditional practice of American courts to leave punitive damages —where the evidence satisfied the legal requirements for imposing such damages—to the discretion of the jury; (2) a process that accorded with such a tradition and did not violate the Bill of Rights necessarily constituted due process; and (3) therefore, he would approve the punitive damages procedure challenged in the case at hand without further inquiry into the procedure's fairness or reasonableness.

KENNEDY, J., concurring in the judgment, expressed the view that, while widespread adherence to an historical practice might not always foreclose further inquiry when a party challenged an ancient institution or procedure as violative of due process, (1) the judgment of history ought to govern the outcome in the case at hand; and (2) jury determination of punitive damages had such long and principled recognition as a central part of the nation's system that no further evidence of essential fairness or rationality ought to be deemed necessary.

O'CONNOR, J., dissenting, expressed the view that (1) Alabama's common-law scheme for imposing punitive damages was void for vagueness, because (a) the scheme vested standardless discretion in the jury to fix a penalty, and (b) Alabama's post-jury-verdict application of limiting factors did not cure the vagueness of the jury instructions; (2) even if the Alabama scheme was not void for vagueness, the Alabama scheme included insufficient safeguards to satisfy procedural due process; (3) the Alabama scheme was so lacking in fundamental fairness that (a) the propriety of any specific award was irrelevant, and (b) any punitive damages award rendered under such procedures, no matter how small the amount, was constitutionally infirm; and (4) contrary to the historical approach of Scalia, J., (a) procedural rules, even ancient ones, had to satisfy contemporary notions of due process, and (b) an explosion in the frequency and size of punitive damages awards had exposed the constitutional defects that inhered in the common-law system.

SOUTER, J., did not participate.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

16A Am Jur 2d, Constitutional Law §§ 813-819; 22 Am Jur 2d, Damages §§ 737, 788, 805-811, 994, 995, 1032-1035; 43 Am Jur 2d, Insurance §§ 434, 435, 439, 884, 904

8 Am Jur Pl & Pr Forms (Rev), Damages, Forms 111-114, 311-322

3 Am Jur Proof of Facts 491, Damages; 6 Am Jur Proof of Facts 3d 457, Vicarious Liability Under Doctrine of Ostensible or Apparent Agency

9 Am Jur Trials 131, Actions on Health and Accident Insurance Policies

USCS, Constitution, Amendment 14

L Ed Digest, Constitutional Law § 778

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Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L Ed 2d 823.

Standard of proof as to conduct underlying punitive damage awards—modern status. 58 ALR4th 878.

Sufficiency of showing actual damages to support award of punitive damages—modern cases. 40 ALR4th 11.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death. 35 ALR4th 538.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases. 35 ALR4th 441.

Person to whom renewal premium may be paid or tendered so as to bind insurer. 42 ALR3d 751.

Remedies and measure of damages for wrongful cancellation of life, health, and accident insurance. 34 ALR3d 245.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law §§ 778, 830.7 — fraud by insurance agent — punitive damages — due process — burden of proof

1a-1h. Even if a state-court award of punitive damages against a defendant insurance company for an alleged agent's fraud in the lapse of the plaintiffs' health insurance is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of one plaintiff, and is much in excess of the fine that could be imposed for insurance fraud under the state's statutes, the punitive damages award does not violate the due process clause of the Federal Constitution's Fourteenth Amendment, because (1) the record amply supports the conclusion that the alleged agent was acting as an agent of the insurance company when he defrauded the plaintiffs; (2) imposing punitive damages liability upon the company under the doctrine of respondeat superior does not, under such circumstances, violate the company's due process rights; (3) the traditional, common-law approach of awarding punitive damages—under which approach the amount of the award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar conduct, and the jury's determination is then reviewed by trial and appellate courts to insure that the determination is reasonable—is not so inherently unfair as to deny due process and to be unconstitutional per se, where (a) every state and federal court that has considered the question has reached the same conclusion, (b) the common-law approach was well established before the Fourteenth Amendment was enacted, and (c) nothing in the Amendment's text or history indicates an intention on the part of the Amendment's drafters to overturn the prevailing approach; (4) the particular punitive damages award in the case at hand does not cross the line into constitutional impropriety, for, while the monetary comparisons are wide and may be close to the line, imprisonment as well as a fine could be required of an individual in the criminal context, and the award in the case at hand did not lack objective criteria, where (a) the jury was adequately instructed, (b) the trial court, which conducted a postverdict comparison that conformed with the state's then-applicable standards, specifically found that (i) the conduct in question evidenced intentional malicious, gross, or oppressive fraud, and (ii) the amount of the award was reasonable in light of the importance of discouraging insurers from similar conduct, and (c) the company received the benefit of appropriate appellate review by the state's highest court, which (i) applied the same postverdict standards and approved the verdict thereunder, and (ii) brought to bear all the then-applicable, relevant, state-law factors for appellate review; and (5) even though there is much to be said in favor of a higher standard of proof of punitive damages, the state's lesser standard of "reasonably satisfied from the evidence," when buttressed by such procedural and substantive protections, does not violate due process. (O'Connor, J., dissented from this holding.)

Appeal § 1460 — review of jury finding — punitive damages — individual acting as employee

2a-2c. On certiorari to review a state appellate court's decision upholding a punitive damages award in favor of several plaintiff city employees and against a defendant insurance company for fraud with respect to the lapse of the employees' health insurance—which decision did not disturb a jury's finding that an individual who misappropriated insurance premiums was acting as an employee of the defendant company when the individual defrauded the plaintiffs—the United States Supreme Court will not question the jury's finding and will readily conclude that the individual was acting as an employee of the defendant company when he defrauded the plaintiffs, because such finding is amply supported by the record, where the record shows that (1) the individual was a state-licensed agent for both (a) the defendant company, which wrote life insurance but not group health insurance for municipalities, and (b) a second company, which wrote such group health insurance; (2) even though the two companies were distinct and nonaffiliated entities, the defendant company cannot plausibly claim that the individual was acting wholly as an agent of the second company when the individual defrauded the plaintiffs, for (a) the individual had actual authority to sell life insurance to the plaintiffs, (b) the defendant company derived benefit from those life insurance sales, and (c) the individual's defalcations related to life insurance premiums as well as to the health insurance premiums; (3) the details of the individual's representation admit of no other conclusion, for (a) the individual gave the plaintiffs a single proposal—not multiple ones—for life and health insurance, (b) the individual used the defendant company's letterhead, which he was authorized to use on the defendant company's business, (c) there was no indication at the time that the second company was not affiliated, (d) the trial court found that the individual (i) spoke of only the defendant company, and (ii) indicated that the second company was a subsidiary of the defendant company, (e) the defendant company encouraged the packaging of life and health insurance, (f) the individual worked exclusively out of a branch office of the defendant company in the state, and (g) each month the defendant presented to the city clerk a single invoice on the defendant company's letterhead for both life and health premiums; and (4) before the frauds in the case at hand had been effectuated, the defendant company had received notice that the individual—its agent—was engaged in a pattern of fraud identical to those perpetrated against the plaintiffs, where (a) there had been complaints to the branch office about the absence of coverage purchased through the individual, and (b) the office's manager had been advised of the individual's receipt of noninitial premiums made payable to the individual, which practice was in violation of company policy.

Agency § 41; Constitutional Law § 778; Damages § 28; Master and Servant § 153 — fraud — vicarious liability to third party — punitive damages — state law — due process

3a-3c. Alabama's common-law rule is that a corporation is liable for both compensatory and punitive

damages for fraud of the corporation's employee effected within the scope of employment; Alabama applies this rule in the insurance context, for Alabama has determined that an insurer is more likely to prevent an agent's fraud if given financial incentive to do so; Alabama's imposition of punitive damages liability upon a defendant insurance company for an individual's fraud under the doctrine of respondeat superior does not, on the facts of the case, violate the company's due process rights, under the Federal Constitution's Fourteenth Amendment, where it is determined that the individual was acting as an employee of the company when the individual defrauded the plaintiffs with respect to the lapse of the plaintiffs' health insurance, because (1) the Alabama rule rationally advances the state's interest in minimizing frauds, for (a) imposing exemplary damages on a corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position to guard substantially against an evil to be prevented, (b) if an insurer were liable for such damages only upon proof that the insurer was at fault independently, then the insurer would have an incentive to minimize the oversight of the insurer's agents, and (c) imposing liability without independent fault deters fraud more than a less stringent rule, and (2) prior decisions in a broad range of both civil and criminal contexts make clear that imposing such liability is not fundamentally unfair and does not itself violate due process.

Constitutional Law § 778; Damages § 16 — due process — punitive damages

4a-4c. It is inappropriate for the United States Supreme Court to say that because punitive damages have been recognized for so long, the imposition of punitive damages is never unconstitutional under the due process clause of the Federal Constitution's Fourteenth Amendment, where the Supreme Court has expressed concern about punitive damages that "run wild"; while unlimited jury discretion—or unlimited judicial discretion—in the fixing of the punitive damages may invite extreme results that jar one's constitutional sensibilities, the Supreme Court need not, and indeed cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case; general concerns of reasonableness and adequate guidance from the court when a case is tried to a jury properly enter into the constitutional calculus; even though, under the law of Alabama and under the law of most states, punitive damages are imposed for purposes of retribution and deterrence, and even though punitive damages have been described as quasi-criminal, such purposes and description do not in themselves provide the answer to whether punitive damages violate due process; as long as the discretion allowed under a state's law in determining punitive damages is exercised within reasonable constraints, due process is satisfied. (Scalia and Kennedy, JJ., dissented in part from this holding.)

Constitutional Law §§ 770, 778 — due process — instructions to jury — punitive damages

5a, 5b. With respect to an award of punitive damages against a defendant insurance company, a state

trial court's instructions to the jury reasonably accommodate the company's interest in rational decision-making and the state's interest in meaningful individualized assessment of appropriate deterrence and retribution, for purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, because (1) while such instructions give the jury significant discretion in determining punitive damages, that discretion is not unlimited, but is confined to deterrence and retribution—the state policy concerns sought to be advanced—where the trial court expressly describes to the jury the purpose of punitive damages, namely, not to compensate the plaintiff for any injury, but to punish the defendant and to protect the public by deterring the defendant and others from doing such wrong in the future; (2) any evidence of the defendant's wealth is excluded from the trial in accordance with the state's law; (3) the trial court further instructs the jury that if punitive damages are to be awarded, then the jury must take into consideration (a) the character and degree of the wrong as shown by the evidence, and (b) the necessity of preventing similar wrongs; (4) the instructions thus (a) enlighten the jury as to the nature and purpose of punitive damages, (b) identify the damages as punishment for civil wrongdoing, and (c) explain that the imposition of such damages is not compulsory; and (5) the discretion allowed under the state's law in determining punitive damages is no greater than that pursued in many familiar areas of the law, such as deciding (a) the best interests of the child, (b) reasonable care, (c) due diligence, or (d) appropriate compensation for pain and suffering or mental anguish. (O'Connor, J., dissented from this holding.)

Constitutional Law § 778 — due process — punitive damages — review of award

6a-6c. For purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, a state's post-jury-verdict standards of review provide for a rational relationship in determining whether a particular punitive damages award is greater than reasonably necessary to punish and deter, where (1) the state's postverdict test insures meaningful and adequate review by the trial court whenever a jury has fixed punitive damages; (2) the application by the state's highest court of the state's appellate-review standards imposes a sufficiently definite and meaningful constraint on the discretion of state factfinders in awarding punitive damages; and (3) such standards have a real effect, having (a) been applied in trial practice, and (b) resulted in the reduction of punitive damages awards by the state's highest court on postverdict review. (O'Connor, J., dissented in part from this holding.)

Constitutional Law § 778 — due process — punitive damages — review by trial court

7. For purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, a state's postverdict test insures meaningful and adequate review by the trial court whenever a jury has fixed punitive damages, where (1) the state requires trial courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages; and (2) among the factors deemed appropriate for the trial court's consideration are (a) the cul-

pability of the defendant's conduct, (b) the desirability of discouraging others from similar conduct, (c) the impact upon the parties, and (d) other factors, such as the impact upon innocent third parties. (O'Connor, J., dissented in part from this holding.)

Constitutional Law §§ 774, 778 — due process — punitive damages — appellate review

8a, 8b. The application by a state's highest court of the state's appellate-review standards imposes a sufficiently definite and meaningful constraint on the discretion of state factfinders in awarding punitive damages, for purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, because the appellate review by the state's highest court insures that such awards are not grossly out of proportion to the severity of the offenses and have some understandable relation to compensatory damages—that is, the appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition—where (1) the state's highest court (a) undertakes a comparative analysis, (b) applies the detailed, substantive standards that the court has developed for evaluating punitive damages awards, and (c) makes a review to insure that the award does not exceed an amount that will accomplish society's goals of punishment and deterrence; and (2) the state's highest court has announced that the factors which can be taken into consideration in determining whether an award is excessive or inadequate are (a) whether there is a reasonable relationship between the punitive damages award and the harm that is likely to result from the defendant's conduct as well as the harm that actually has occurred, (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct, (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss, (d) the financial position of the defendant, (e) all the costs of litigation, (f) the imposition of criminal sanctions on the defendant for the defendant's conduct, these to be taken in mitigation, and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. (O'Connor, J., dissented in part from this holding.)

Damages § 16 — punitive damages

9. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect on the victim, the likelihood of the wrong's recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth.

SYLLABUS BY REPORTER OF DECISIONS

After respondents' health insurance lapsed when one Ruffin, an agent for petitioner insurance company and another, unaffiliated insurance company, misappropriated premiums issued by respondents' employer for payment to the other insurer, respondents filed an action for

damages in state court, claiming fraud by Ruffin and seeking to hold petitioner liable on a respondeat superior theory. Following the trial court's charge instructing the jury that it could award punitive damages if, inter alia, it determined there was liability for fraud, the jury, among other things, returned a verdict for respondent Haslip of over $1 million against petitioner and Ruffin, which sum included a punitive damages award that was more than four times the amount of compensatory damages Haslip claimed. The Supreme Court of Alabama affirmed, specifically upholding the punitive damages award.

Held: The punitive damages award in this case did not violate the Due Process Clause of the Fourteenth Amendment.

(a) Holding petitioner responsible for Ruffin's acts did not violate substantive due process. The jury's finding that Ruffin was acting within the scope of his apparent authority as an agent of petitioner when he defrauded respondents was not disturbed by the State Supreme Court and is amply supported by the record. Moreover, Alabama's longstanding common-law rule that an insurer is liable for both compensatory and punitive damages for the intentional fraud of its agent effected within the scope of his employment rationally advances the State's interest in minimizing fraud, since that rule creates a strong financial incentive for vigilance by insurers. Thus, imposing liability on petitioner under the respondeat superior doctrine is not fundamentally unfair.

(b) Since every state and federal court considering the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

(c) Nevertheless, unlimited jury or judicial discretion in the fixing of punitive damages may invite extreme results that are unacceptable under the Due Process Clause. Although a mathematical bright line cannot be drawn between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

(d) The punitive damages assessed against petitioner, although large in comparison to the compensatory damages claimed by Haslip, did not violate due process, since the award did not lack objective criteria and was subject to the full panoply of procedural protections. First, the trial court's instructions placed reasonable constraints on the exercise of the jury's discretion by expressly describing punitive damages' purposes of retribution and deterrence, by requiring the jury to consider the character and degree of the particular wrong, and by explaining that the imposition of punitive damages was not compulsory. Second, the trial court conducted a post-verdict hearing that conformed with Hammond v Gadsden, 493 So 2d 1374 (Ala), which sets forth standards that ensure meaningful and adequate review of punitive awards. Third, petitioner received the benefit of appropriate review by the State

Supreme Court, which applied the Hammond standards, approved the verdict thereunder, and brought to bear all relevant factors recited in Green Oil Co. v Hornsby, 539 So 2d 218 (Ala), for ensuring that punitive damages are reasonable.

553 So 2d 537, affirmed.

Blackmun, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Marshall, and Stevens, JJ., joined. Scalia, J., and Kennedy, J., filed opinions concurring in the judgment. O'Connor, J., filed a dissenting opinion. Souter, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Bruce A. Beckman argued the cause for petitioner.

Bruce J. Ennis, Jr. argued the cause for respondents.

Briefs of Counsel, p 743, infra.

OPINION OF THE COURT

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Justice **Blackmun** delivered the opinion of the Court.

[1a] This case is yet another that presents a challenge to a punitive damages award.

I

In 1981, Lemmie L. Ruffin, Jr., was an Alabama-licensed agent for petitioner Pacific Mutual Life Insurance Company. He also was a licensed agent for Union Fidelity Life Insurance Company. Pacific Mutual and Union are distinct and nonaffiliated entities. Union wrote group health insurance for municipalities. Pacific Mutual did not.

Respondents Cleopatra Haslip, Cynthia Craig, Alma M. Calhoun, and Eddie Hargrove were employees of Roosevelt City, an Alabama municipality. Ruffin, presenting himself as an agent of Pacific Mutual, solicited the city for both health and life insurance for its employees. The city was interested. Ruffin gave the city a single proposal for both coverages. The city approved and, in August 1981, Ruffin prepared separate applications for the city and its employees for group health with Union and for individual life policies with Pacific Mutual. This packaging of health insurance with life

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insurance, although from different and unrelated insurers, was not unusual. Indeed, it tended to boost life insurance sales by minimizing the loss of customers who wished to have both health and life protection. The initial premium payments were taken by Ruffin and submitted to the insurers with the applications. Thus far, nothing is claimed to have been out of line. Respondents were among those with the health coverage.

An arrangement was made for Union to send its billings for health premiums to Ruffin at Pacific Mutual's Birmingham office. Premium payments were to be effected through payroll deductions. The city clerk each month issued a check for those premiums. The check was sent to Ruffin or picked up by him. He, however, did not remit to Union the premium payments received from the city; instead, he misappropriated most of them. In late 1981, when Union did not receive payment, it sent notices of lapsed health coverage to respondents in care of Ruffin and Patrick Lupia, Pacific Mutual's agent-in-charge of its Birmingham office. Those notices were not for-

warded to respondents. Although there is some evidence to the contrary, see Reply Brief for Petitioner B1-B4, the trial court found, App to Pet for Cert A2, that respondents did not know that their health policies had been canceled.

II

Respondent Haslip was hospitalized on January 23, 1982. She incurred hospital and physician's charges. Because the hospital could not confirm health coverage, it required Haslip, upon her discharge, to make a payment upon her bill. Her physician, when he was not paid, placed her account with a collection agency. The agency obtained a judgment against Haslip, and her credit was adversely affected.

In May 1982, respondents filed this suit, naming as defendants Pacific Mutual (but not Union) and Ruffin, individually and as a proprietorship, in the Circuit Court for Jefferson

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County, Ala. It was alleged that Ruffin collected premiums but failed to remit them to the insurers so that respondents' respective health insurance policies lapsed without their knowledge. Damages for fraud were claimed. The case against Pacific Mutual was submitted to the jury under a theory of respondeat superior.

Following the trial court's charge on liability, the jury was instructed that if it determined there was liability for fraud, it could award punitive damages. That part of the instructions is set forth in the margin.[1] Pacific Mutual made no objection on the ground of lack of specificity in the instructions, and it did not propose a more particularized charge. No evidence was introduced as to Pacific Mutual's financial worth. The jury returned general verdicts for respondents against Pacific Mutual and Ruffin in the following amounts:

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Haslip:	$1,040,000[2]
Calhoun:	15,290
Craig:	12,400
Hargrove:	10,288

1. "Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

"This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

"Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App 105-106.

2. Although there is controversy about the matter, it is probable that the general verdict for respondent Haslip contained a punitive damages component of not less than $840,000. In Haslip's counsel's argument to the jury, compensatory damages of $200,000 (including out-of-pocket expenditures of less than $4,000) and punitive damages of $3,000,000 were re-

Judgments were entered accordingly.

On Pacific Mutual's appeal, the Supreme Court of Alabama, by a divided vote, affirmed. 553 So 2d 537 (1989). In addition to issues not now before us, the court ruled that, while punitive damages are not recoverable in Alabama for misrepresentation made innocently or by mistake, they are recoverable for deceit or willful fraud, and that on the evidence in this case a jury could not have concluded that Ruffin's misrepresentations were made either innocently or mistakenly. Id., at 540. The majority then specifically upheld the punitive damages award. Id., at 543.

One Justice concurred in the result without opinion.[3] Ibid. Two Justices dissented in part on the ground that the award of punitive damages violated Pacific Mutual's due process rights under the Fourteenth Amendment. Id., at 544-545.

Pacific Mutual, but not Ruffin, then brought the case here. It challenged punitive damages in Alabama as the product of unbridled jury discretion and as violative of its due process rights. We stayed enforcement of the Haslip judgment, 493 US 1014, 107 L Ed 2d 731, 110 S Ct 710 (1990), and then granted certiorari, 494 US

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1065, 108 L Ed 2d 782, 110 S Ct 1780 (1990), to review the punitive damages procedures and award in the light of the long-enduring debate about their propriety.[4]

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quested. Tr 810-814. For present purposes, we accept this description of the verdict.

3. This Justice, in a later case, appears to have rethought his position with respect to punitive damages under Alabama law. See Charter Hospital of Mobile, Inc. v Weinberg, 558 So 2d 909, 913 (1990) (Houston, J., concurring specially). He did not address the question of the constitutionality of punitive damages in Alabama under the United States Constitution. Id., at 914.

4. Compare, e.g., Fay v Parker, 53 NH 342, 382 (1872) ("The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law"), with Luther v Shaw, 157 Wis 234, 238, 147 NW 18, 19-20 (1914) (Timlin, J., "Speaking for myself only in this paragraph . . . . The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law").

This debate finds replication in the many amicus briefs filed here. See, e.g., Brief for Alliance of American Insurers et al. 5 ("The Due Process Clause imposes substantive limits on the amounts of punitive damages that civil juries can award. This conclusion is evident from history"); Brief for American Institute of Architects et al. 4 ("Punitive damages are today awarded with a frequency and in amounts that are startling. . . . This system of punitive damages—where punitive awards are routine and fantastic verdicts receive little attention—is entirely a product of the last 20 years"); Brief for Business Roundtable et al. 2 ("[A]n award that is not rationally related to the retributive and deterrent purposes of punitive damages is unconstitutionally excessive"); Brief for Defense Research Institute 2 ("No society concerned for fairness and regularity in the administration of justice can afford to tolerate an essentially lawless regime of punishment"); Brief for Pharmaceutical Manufacturers Association et al. 4 ("[A]ny award of punitive damages for lawful conduct approved in advance by the [Food and Drug Administration] must be deemed arbitrary and excessive"); Brief for Aetna Life Insurance Co., et al. 6 ("[A] State may impose punishment on its citizens only pursuant to standards established in advance"); Brief for Hospital Authority of Gwinnett County, Georgia 2 ("[I]n the absence of a statute . . . an award of punitive

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III

This Court and individual Justices thereof on a number of occasions in recent years have expressed doubts about the constitutionality of certain punitive damages awards.

In Browning-Ferris Industries of Vt., Inc. v Kelco Disposal, Inc., 492 US 257, 106 L Ed 2d 219, 109 S Ct 2909 (1989), all nine participating Members of the Court noted concern. In that case, punitive damages awarded on a state-law claim were challenged under the Eighth and Fourteenth Amendments and on federal common-law grounds. The majority held that the Excessive Fines Clause of the Eighth Amendment did not apply to a punitive damages award in a civil case between private parties; that the claim of excessiveness under the Due Process Clause of the Fourteenth Amendment had not been raised in either the District Court or the Court of Appeals and therefore was not to be considered here; and that federal common law did not provide a basis for disturbing the jury's punitive damages award. The Court said:

> "The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But petitioners make no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice. Instead, they seek
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> [499 US 10]
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> further due process protections, addressed directly to the size of the damages award. There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme . . . but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. . . . That inquiry must await another day." Id., at 276-277, 106 L Ed 2d 219, 109 S Ct 2909.

Justice Brennan, joined by Justice Marshall, wrote separately:

> "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive dam-

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damages . . . violates the defendant's right to due process . . . unless it is shown by clear and convincing evidence that the act constituted a crime. . . . [A]wards of punitive damages in excess of twice the amount of actual damages (that is, awards in excess of treble damages) . . . violate . . . due process. . ."); Brief for Mid-America Legal Foundation 8 ("[S]ystem as applied today merely introduces a wildcard into the legal process. . ."); Brief for Association for California Tort Reform 2 ("Until state legislatures do their job and set maximum limits for punitive awards and establish meaningful criteria for juries to use, punitive damages are per se a violation of due process"); Brief for Association of Trial Lawyers of America 3 ("There is no 'explosion' . . . . [P]unitive damages neither deter innovation nor place American businesses at a competitive disadvantage. . ."); Brief for National Insurance Consumer Organization 3 ("Punitive damages have developed as the most effective means by which the states can protect their citizens against corporate misconduct"); Brief for State of Alabama et al. 1 ("[T]he States—and not this Court—should decide how and when punitive damages may be assessed in civil cases between private litigants").

ages in civil cases brought by private parties. . .

. . . . .

"Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. . .

. . . . .

"Since the Court correctly concludes that Browning-Ferris' challenge based on the Due Process Clause is not properly before us, however, I leave fuller discussion of these matters for another day." Id., at 280-282, 106 L Ed 2d 219, 109 S Ct 2909.

Justice O'Connor, joined by Justice Stevens, concurring in part and dissenting in part, observed:

"Awards of punitive damages are skyrocketing. . .

. . . . .

". . . I do . . . agree with the Court that no due process claims—either procedural or substantive—are properly presented in this case, and that the award of punitive damages here should not be overturned as a matter of

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federal common law. . . . Moreover, I share Justice Brennan's view, ante, at 280-282 [106 L Ed 2d 219, 109 S Ct 2909], that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed . . . ." Id., at 282-283, 106 L Ed 2d 219, 109 S Ct 2909.

In Bankers Life & Casualty Co. v Crenshaw, 486 US 71, 100 L Ed 2d 62, 108 S Ct 1645 (1988), a challenge to a punitive damages award was made.

The Court, however, refused to reach claims that the award violated the Due Process Clause and other provisions of the Federal Constitution since those claims had not been raised and passed upon in state court. Id., at 76-80, 100 L Ed 2d 62, 108 S Ct 1645. Justice O'Connor, joined by Justice Scalia, concurring in part and concurring in the judgment, said:

"Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

. . . . .

"This due process question, serious as it is, should not be decided today. . . . I concur in the Court's judgment on this question and would leave for another day the consideration of these issues." Id., at 87-89, 100 L Ed 2d 62, 108 S Ct 1645.

In Aetna Life Ins. Co. v Lavoie, 475 US 813, 89 L Ed 2d 823, 106 S Ct 1580 (1986), another case that came here from the Supreme Court of Alabama, the appellant argued that the imposition of punitive damages was impermissible under the Eighth Amendment and violated the Due Process Clause of the Fourteenth Amendment. The Court

stated: "These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them." Id., at 828-829, 89 L Ed 2d 823, 106 S Ct 1580.

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See also Newport v Fact Concerts, Inc. 453 US 247, 270-271, 69 L Ed 2d 616, 101 S Ct 2748 (1981) ("The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial . . ."); Electrical Workers v Foust, 442 US 42, 50-51, 60 L Ed 2d 698, 99 S Ct 2121 (1979); Gertz v Robert Welch, Inc. 418 US 323, 350, 41 L Ed 2d 789, 94 S Ct 2997 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"); Rosenbloom v Metromedia, Inc. 403 US 29, 82-84, 29 L Ed 2d 296, 91 S Ct 1811 (1971) (Marshall, J., joined by Stewart, J., dissenting); Missouri Pacific R. Co. v Tucker, 230 US 340, 351, 57 L Ed 1507, 33 S Ct 961 (1913); Southwestern Telegraph & Telephone Co. v Danaher, 238 US 482, 491, 59 L Ed 1419, 35 S Ct 886 (1915); St. Louis, I. M. & S. R. Co. v Williams, 251 US 63, 67, 64 L Ed 139, 40 S Ct 71 (1919).

The constitutional status of punitive damages, therefore, is not an issue that is new to this Court or unanticipated by it. Challenges have been raised before; for stated reasons, they have been rejected or deferred. For example, in Browning-Ferris, supra, we rejected the claim that punitive damages awarded in a civil case could violate the Eighth Amendment and refused to consider the tardily raised due process argument. But the Fourteenth Amendment due process challenge is here once again.

IV

[2a, 3a] Two preliminary and overlapping due process arguments raised by Pacific Mutual deserve attention before we reach the principal issue in controversy. Did Ruffin act within the scope of his apparent authority as an agent of Pacific Mutual? If so, may Pacific Mutual be held responsible for Ruffin's fraud on a theory of respondeat superior?

[2b] Pacific Mutual was held responsible for the acts of Ruffin. The insurer mounts a challenge to this result on substantive due process grounds, arguing that it was not shown that either it or its Birmingham manager was aware that Ruffin

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was collecting premiums contrary to his contract; that Pacific Mutual had no notice of the actions complained of prior to the filing of the complaint in this litigation; that it did not authorize or ratify Ruffin's conduct; that his contract with the company forbade his collecting any premium other than the initial one submitted with an application; and that Pacific Mutual was held liable and punished for unauthorized actions of its agent for acts performed on behalf of another company. Thus, it is said, when punitive damages were imposed on Pacific Mutual, the focus for determining the amount of those damages shifted from Ruffin, where it belonged, to Pacific Mutual, and obviously and unfairly contributed to the amount of the punitive damages and their disproportionality. Ruffin was acting not to benefit Pa-

cific Mutual but for his own benefit, and to hold Pacific Mutual liable is "beyond the point of fundamental fairness," Brief for Petitioner 29, embodied in due process, id., at 32. It is said that the burden of the liability comes to rest on Pacific Mutual's other policyholders.

The jury found that Ruffin was acting as an employee of Pacific Mutual when he defrauded respondents. The Supreme Court of Alabama did not disturb that finding. There is no occasion for us to question it, for it is amply supported by the record. Ruffin had actual authority to sell Pacific Mutual life insurance to respondents. The insurer derived economic benefit from those life insurance sales. Ruffin's defalcations related to the life premiums as well as to the health premiums. Thus, Pacific Mutual cannot plausibly claim that Ruffin was acting wholly as an agent of Union when he defrauded respondents.

The details of Ruffin's representation admit of no other conclusion. He gave respondents a single proposal—not multiple ones—for both life and health insurance. He used Pacific Mutual letterhead, which he was authorized to use on Pacific Mutual business. There was, however, no indication that Union was a nonaffiliated company. The trial court found that Ruffin "spoke only of Pacific Mutual and indicated

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that Union Fidelity was a subsidiary of Pacific Mutual." App to Pet for Cert A2. Pacific Mutual encouraged the packaging of life and health insurance. Ruffin worked exclusively out of a Pacific Mutual branch office. Each month he presented to the city clerk a single invoice on Pacific Mutual letterhead for both life and health premiums.

Before the frauds in this case were effectuated, Pacific Mutual had received notice that its agent Ruffin was engaged in a pattern of fraud identical to those perpetrated against respondents. There were complaints to the Birmingham office about the absence of coverage purchased through Ruffin. The Birmingham manager was also advised of Ruffin's receipt of noninitial premiums made payable to him, a practice in violation of company policy.

[3b] Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the State's interest in minimizing fraud. Alabama long has applied this rule in the insurance context, for it has determined that an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. See British General Ins. Co. v Simpson Sales Co. 265 Ala 683, 688, 93 So 2d 763, 768 (1957).

Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented." Louis Pizitz Dry Goods Co. v Yeldell, 274 US 112, 116, 71 L Ed 952, 47 S Ct 509, 51 ALR 1376 (1927). If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents. Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State's goal. We cannot say this is a violation of Fourteenth Amend-

ment due process. See American Society of Mechanical Engineers, Inc. v Hydrolevel

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Corp. 456 US 556, 72 L Ed 2d 330, 102 S Ct 1935 (1982); Pizitz, 274 US, at 115, 71 L Ed 952, 47 S Ct 509, 51 ALR 1376. These and other cases in a broad range of civil and criminal contexts make clear that imposing such liability is not fundamentally unfair and does not in itself violate the Due Process Clause. See Shevlin-Carpenter Co. v Minnesota, 218 US 57, 54 L Ed 930, 30 S Ct 663 (1910); United States v Balint, 258 US 250, 252, 66 L Ed 604, 42 S Ct 301 (1922); United States v Park, 421 US 658, 670, 44 L Ed 2d 489, 95 S Ct 1903 (1975).

[1b, 2c, 3c] We therefore readily conclude that Ruffin was acting as an employee of Pacific Mutual when he defrauded respondents, and that imposing liability upon Pacific Mutual for Ruffin's fraud under the doctrine of respondeat superior does not, on the facts here, violate Pacific Mutual's due process rights.

V

[1c] "Punitive damages have long been a part of traditional state tort law." Silkwood v Kerr-McGee Corp. 464 US 238, 255, 78 L Ed 2d 443, 104 S Ct 615 (1984). Blackstone appears to have noted their use. 3 W. Blackstone, Commentaries * 137-* 138. See also Wilkes v Wood, Lofft 1, 98 Eng Rep 489 (CP 1763) (The Lord Chief Justice validating exemplary damages as compensation, punishment, and deterrence). Among the first reported American cases are Genay v Norris, 1 Bay 6 (SC 1784), and Coryell v Colbaugh, 1 NJL 77 (1791).[5]

Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

This Court more than once has approved the common-law method for assessing punitive awards. In Day v Woodworth, 13 How 363, 14 L Ed 181 (1852), a case decided before the adoption

[499 US 16]

of the Fourteenth Amendment, Justice Grier, writing for a unanimous Court, observed:

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.
>
> ". . . This has been always left to the discretion of the jury, as the

5. For informative historical comment, see Owen, Punitive Damages in Products Liability Litigation, 74 Mich L Rev 1257, 1262-1264, and nn 17-23 (1976).

degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." Id., at 371, 14 L Ed 181.

In Missouri Pacific R. Co. v Humes, 115 US 512, 29 L Ed 463, 6 S Ct 110 (1885), the Court stated: "The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." Id., at 521, 29 L Ed 463, 6 S Ct 110. See also Barry v Edmunds, 116 US 550, 565, 29 L Ed 729, 6 S Ct 501 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"); Minneapolis & St. Louis R. Co. v Beckwith, 129 US 26, 36, 32 L Ed 585, 9 S Ct 207 (1889) ("The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law. It is only one mode of imposing a penalty for the violation of duty, and its propriety and legality have been recognized . . . by

[499 US 17]

repeated judicial decisions for more than a century. Its authorization by the law in question . . . cannot therefore be justly assailed as infringing upon the Fourteenth Amendment of the Constitution of the United States"); Standard Oil Co. v Missouri, 224 US 270, 285, 56 L Ed 760, 32 S Ct 406 (1912) ("Nor, from a Federal standpoint, is there any invalidity in the judgment because there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing."); Louis Pizitz Dry Goods Co. v Yeldell, supra, 71 L Ed 952, 47 S Ct 509, 51 ALR 1376 (1927) (although the issue was raised in the briefs, the Court did not discuss the claim); Memphis Community School Dist. v Stachura, 477 US 299, 306, n 9, 91 L Ed 2d 249, 106 S Ct 2537 (1986). Recently, in Smith v Wade, 461 US 30, 75 L Ed 2d 632, 103 S Ct 1625 (1983), this Court affirmed the assessment of punitive damages pursuant to 42 USC § 1983 [42 USCS § 1983], where the trial court used the common-law method for determining the amount of the award.[6]

So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. But see New Orleans, J. & G. N. R. Co. v Hurst, 36 Miss 660 (1859). In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional. "'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" Sun Oil Co. v Wortman, 486 US 717, 730, 100 L Ed 2d 743, 108 S Ct 2117 (1988), quoting Jackman v Rosenbaum Co., 260 US 22, 31, 67 L Ed 107,

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6. Congress by statute in a number of instances has provided for punitive damages. See, e.g., 11 USC §§ 303(i)(2)(B), 362(h), and 363(n) [11 USCS §§ 303(i)(2)(B), 362(h), and 363(n)]; 12 USC § 3417(a)(3) [12 USCS § 3417(a)(3)]; 15 USC §§ 78u(h)(7)(A)(iii), 298(c), 1116(d)(11), and 1681n(2) [15 USCS §§ 78u(h)(7)(A)(iii), 298(c), 1116(d)(11), and 1681n(2)]; 26 USC § 7431(c)(1)(B)(ii) [26 USCS § 7431(c)(1)(B)(ii)]; 33 USC § 1514(c) [33 USCS § 1514(c)].

43 S Ct 9 (1922). As the Court in Day v Woodworth, 54 US 363, 14 L Ed 181 (1852), made clear, the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's

[499 US 18]

text or history indicates an intention on the part of its drafters to overturn the prevailing method. See Burnham v Superior Court of Cal., County of Marin, 495 US 604, 109 L Ed 2d 631, 110 S Ct 2105 (1990); Snyder v Massachusetts, 291 US 97, 111, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934) ("The Fourteenth Amendment has not displaced the procedure of the ages").[7]

[1d, 4a] This, however, is not the end of the matter. It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. See Williams v Illinois, 399 US 235, 239, 26 L Ed 2d 586, 90 S Ct 2018 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . ."). We note once again our concern about punitive damages that "run wild." Having said that, we conclude that our task today is to determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable.

VI

[1e, 4b] One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. See Waters-Pierce Oil Co. v Texas (No. 1), 212 US 86, 111, 53 L Ed 417, 29 S Ct 220 (1909).[8] We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. With these concerns in mind, we

[499 US 19]

review the constitutionality of the punitive damages awarded in this case.

We conclude that the punitive damages assessed by the jury against Pacific Mutual were not violative of the Due Process Clause of the Fourteenth Amendment. It is true, of course, that under Alabama law, as under the law of most States, punitive damages are imposed for purposes of retribution and deterrence. Aetna Life Ins. Co. v Lavoie, 470 So 2d 1060, 1076 (Ala 1984). They have been described as quasi-criminal. See Smith v Wade, 461 US 30, 59, 75 L Ed 2d 632, 103 S Ct 1625 (1983) (Rehnquist, J., dissenting). But this in itself does not provide the answer. We move, then, to the points of specific attack.

[5a] 1. We have carefully reviewed the instructions to the jury. By these instructions, see n 1, supra, the trial court expressly described for the jury the purpose of punitive damages, namely, "not to compensate the plaintiff for any injury" but "to

7. See RAND Institute for Civil Justice, M. Peterson, S. Sarma, & M. Shanley, Punitive Damages—Empirical Findings (1987).

8. See also Owen, The Moral Foundations of Punitive Damages, 40 Ala L Rev 705, 739 (1989) ("Yet punitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values").

punish the defendant" and "for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future." App 105-106. Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law. See Southern Life & Health Ins. Co. v Whitman, 358 So 2d 1025, 1026-1027 (Ala 1978).

To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App 106. The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.

[499 US 20]

[4c, 5b] These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish.[9] As long as the discretion is exercised within reasonable constraints, due process is satisfied. See, e.g., Schall v Martin, 467 US 253, 279, 81 L Ed 2d 207, 104 S Ct 2403 (1984); Greenholtz v Inmates of Nebraska Penal and Correctional Complex, 442 US 1, 16, 60 L Ed 2d 668, 99 S Ct 2100 (1979). See also McGautha v California, 402 US 183, 207, 28 L Ed 2d 711, 91 S Ct 1454 (1971).

[6a, 7] 2. Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. In Hammond v Gadsden, 493 So 2d 1374 (1986), it stated that trial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." Id., at 1379. Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." Ibid. The Hammond test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

[8a] 3. By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial

[499 US 21]

court's discretion. It first undertakes a comparative analysis. See, e.g., Aetna Life Ins. Co. v

9. The Alabama Legislature recently enacted a statute that places a $250,000 limit on punitive damages in most cases. See 1987 Ala Acts, No. 87-185, §§ 1, 2, and 4. The legislation, however, became effective only on June 11, 1987, see § 12, after the cause of action in the present case arose and the complaint was filed.

Lavoie, 505 So 2d 1050, 1053 (1987). It then applies the detailed substantive standards it has developed for evaluating punitive awards.[10] In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." Green Oil Co. v Hornsby, 539 So 2d 218, 222 (1989); Wilson v Dukona Corp. 547 So 2d 70, 73 (1989). This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.

Also before its ruling in the present case, the Supreme Court of Alabama had elaborated and refined the Hammond criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. Hornsby, 539 So 2d, at 223-224; Central Alabama, 546 So 2d, at 376-377. It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

[499 US 22]

(c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

[6b, 8b, 9] The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

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10. See Central Alabama Electric Cooperative v Tapley, 546 So 2d 371, 377-378 (Ala 1989). This, we feel, distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in Browning-Ferris Industries of Vt., Inc. v Kelco Disposal, Inc. 492 US 257, 106 L Ed 2d 219, 109 S Ct 2909 (1989), and in Bankers Life & Casualty Co. v Crenshaw, 486 US 71, 100 L Ed 2d 62, 108 S Ct 1645 (1988). In those respective schemes, an amount awarded would be set aside or modified only if it was "manifestly and grossly excessive," Pezzano v Bonneau, 133 Vt 88, 91, 329 A2d 659, 661 (1974), or would be considered excessive when "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience," Bankers Life & Casualty Co. v Crenshaw, 483 So 2d 254, 278 (Miss 1985).

[1f, 6c] These standards have real effect when applied by the Alabama Supreme Court to jury awards. For examples of their application in trial practice, see Hornsby, 539 So 2d, at 219, and Williams v Ralph Collins Ford-Chrysler, Inc. 551 So 2d 964, 966 (1989). And postverdict review by the Alabama Supreme Court has resulted in reduction of punitive awards. See, e.g., Wilson v Dukona Corp. 547 So 2d, at 74; United Services Automobile Assn. v Wade, 544 So 2d 906, 917 (1989). The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter. They surely are as specific as those adopted legislatively in Ohio Rev Code

[499 US 23]

Ann § 2307.80(B) (Supp 1989) and in Mont Code Ann § 27-1-221 (1989).[11]

[1h] Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a postverdict hearing that conformed with Hammond. The trial court specifically found that the conduct in question "evidenced intentional malicious, gross, or oppressive fraud," App to Pet for Cert A14, and found the amount of the award to be reasonable in light of the importance of discouraging insurers from similar conduct, id., at A15. Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the Hammond standards and approved the verdict thereunder. It brought to bear all relevant factors recited in Hornsby.

We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip, see n 2, supra, and, of course, is much in excess of the fine that could be imposed for insurance fraud under Ala Code §§ 13A-5-11 and 13A-5-12(a) (1982), and Ala Code §§ 27-1-12, 27-12-17, and 27-12-23 (1986). Imprisonment, however, could also be required of an individual in the criminal context. While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration,

[499 US 24]

that in this case it does not cross the line into the area of constitutional impropriety.[12] Accordingly, Pacific Mutual's due process challenge must be, and is, rejected.

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11. **[1g]** We have considered the arguments raised by Pacific Mutual and some of its amici as to the constitutional necessity of imposing a standard of proof of punitive damages higher than "preponderance of the evidence." There is much to be said in favor of a State's requiring, as many do, see, e.g., Ohio Rev Code Ann § 2307.80 (Supp 1989), a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," see Colo Rev Stat § 13-25-127(2) (1987), as in the criminal context. We are not persuaded, however, that the Due Process Clause requires that much. We feel that the lesser standard prevailing in Alabama—"reasonably satisfied from the evidence"—when buttressed, as it is, by the procedural and substantive protections outlined above, is constitutionally sufficient.

12. Pacific Mutual also makes what it calls a void-for-vagueness argument and, in support thereof, cites Giaccio v Pennsylvania, 382 US 399, 15 L Ed 2d 447, 86 S Ct 518 (1966). That case, however, is not helpful. The Court there struck down a Pennsylvania statute allowing costs to be awarded against a defendant acquitted of a misdemeanor. The statute did not concern jury discretion in fixing the amount of costs. Decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred.

The judgment of the Supreme Court of Alabama is affirmed.

It is so ordered.

Justice **Souter** took no part in the consideration or decision of this case.

SEPARATE OPINIONS

Justice **Scalia,** concurring in the judgment.

In Browning-Ferris Industries of Vt., Inc. v Kelco Disposal, Inc. 492 US 257, 106 L Ed 2d 219, 109 S Ct 2909 (1989), we rejected the argument that the Eighth Amendment limits punitive damages awards, but left for "another day" the question whether "undue jury discretion to award punitive damages" violates the Due Process Clause of the Fourteenth Amendment, id., at 277, 106 L Ed 2d 219, 109 S Ct 2909. That day has come, the due process point has been thoroughly briefed and argued, but the Court chooses to decide only that the jury discretion in the present case was not undue. It says that Alabama's particular procedures (at least as applied here) are not so "unreasonable" as to "cross the line into the area of constitutional impropriety," ante this page, 113 L Ed 2d, at 23. This jury-like verdict provides no guidance as to whether any *other* procedures are sufficiently "reasonable," and thus perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve. Since it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements

[499 US 25]

for imposing them) to the discretion of the jury; and since in my view a process that accords with such a tradition and does not violate the Bill of Rights necessarily constitutes "due" process; I would approve the procedure challenged here without further inquiry into its "fairness" or "reasonableness." I therefore concur only in the judgment of the Court.

I

As the Court notes, punitive or "exemplary" damages have long been a part of Anglo-American law. They have always been controversial. As recently as the mid-19th century, treatise writers sparred over whether they even existed. One respected commentator, Professor Simon Greenleaf, argued that no doctrine of authentically "punitive" damages could be found in the cases; he attempted to explain judgments that ostensibly included punitive damages as in reality no more than full compensation. 2 Law of Evidence 235, n 2 (13th ed 1876). This view was not widely shared. In his influential treatise on the law of damages, Theodore Sedgwick stated that "the rule" with respect to the "salutary doctrine" of exemplary damages is that "where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community." Measure of Damages 522 (4th ed 1868). The doctrine, Sedgwick noted, "seems settled in England, and in the general jurisprudence of this country," id., at 35. See also G. Field, Law of Damages 66 (1876) ("[The] doctrine [of punitive damages] seems to be sustained by at

least a great preponderance of authorities, both in England and this country"); J. Sutherland, Law of Damages 721-722, 726-727, n 1 (1882) ("The doctrine that [punitive] damages may be allowed for the purpose of example and punishment, in addition to compensation, in certain cases, is held in nearly all the states of the Union and in England." "Since the time of the controversy between Professor

[499 US 26]

Greenleaf and Mr. Sedgwick (1847) on this subject, a large majority of the appellate courts in this country have followed the doctrine advocated by Mr. Sedgwick . . ."). In Day v Woodworth, 13 How 363, 371, 14 L Ed 181 (1852), this Court observed:

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."

Even fierce opponents of the doctrine acknowledged that it was a firmly established feature of American law. Justice Foster of the New Hampshire Supreme Court, in a lengthy decision disallowing punitive damages, called them "a perversion of language and ideas so ancient and so common as seldom to attract attention," Fay v Parker, 53 NH 342, 343 (1873). The opinion concluded, with more passion than even petitioners in the present case could muster:

> "Undoubtedly this pernicious doctrine has become so fixed in the law . . . that it may be *difficult* to get rid of it. But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly.
>
> ". . . [N]ot reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim —'I have no need of thee.' " Id., at 397 (internal quotations omitted).

In 1868, therefore, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. It is just as clear

[499 US 27]

that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount. As this Court noted in Barry v Edmunds, 116 US 550, 565, 29 L Ed 729, 6 S Ct 501 (1886), "nothing is better settled than that, in cases such as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." See also Missouri Pacific R. Co. v Humes, 115 US 512, 521, 29 L Ed 463, 6 S Ct 110 (1885) ("The discretion of the jury in such cases is not controlled by any very definite rules"). Commentators confirmed that the imposition of punitive damages was not thought to require special procedural safeguards, other than—at most—some review by the trial court. "[I]n cases proper for exemplary damages, it

would seem impracticable to set any bounds to the discretion of the jury, though in cases where the wrong done, though with malicious intent, is greatly disproportioned to the amount of the verdict, the court may exercise the power it always possesses to grant a new trial for excessive damages." Sedgwick, supra, at 537-538, n 1. See also Field, supra, at 65 ("[T]he amount of damages by way of punishment or example, are necessarily largely within the discretion of the jury; the only check . . . being the power of the court to set aside the verdict where it is manifest that the jury were unduly influenced by passion, prejudice, partiality, or corruption, or where it clearly evinces a mistake of the law or the facts of the case"); Sutherland, supra, at 742 ("Whether [punitive damages] shall be allowed, and their amount, are left to the discretion of the jury, but subject to the power of the court to set aside the verdict if it is so excessive that the court may infer that the jury have been influenced by passion or prejudice" (footnote omitted)).

Although both the majority and the dissenting opinions today concede that the common-law system for awarding punitive damages is firmly rooted in our history, both reject the proposition that this is dispositive for due process purposes.

[499 US 28]

Ante, at 17-18, 113 L Ed 2d, at 19-20; post, at 60, 113 L Ed 2d, at 47. I disagree. In my view, it is not for the Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is "due" process, nor do I believe such a rootless analysis to be dictated by our precedents.

II

Determining whether common-law procedures for awarding punitive damages can deny "due process of law" requires some inquiry into the meaning of that majestic phrase. Its first prominent use appears to have been in an English statute of 1354: "[N]o man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law." 28 Edw III, ch 3. Although historical evidence suggests that the word "process" in this provision referred to specific writs employed in the English courts (a usage retained in the phrase "service of process"), see Jurow, Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law, 19 Am J Legal Hist 265, 272-275 (1975), Sir Edward Coke had a different view. In the second part of his Institutes, see 2 Institutes 50 (5th ed 1797), Coke equated the phrase "due process of the law" in the 1354 statute with the phrase "Law of the Land" in Chapter 29 of Magna Charta (Chapter 39 of the original Magna Charta signed by King John at Runnymede in 1215), which provides: "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." 9 Hen III, ch 29 (1225). In Coke's view, the phrase "due process of law" referred to the customary procedures to which freemen were entitled by "the old law of England," 2 Institutes 50.

[499 US 29]

The American colonists were intimately familiar with Coke, see R. Mott, Due Process of Law 87-90, 107

(1926); A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 117-125 (1968), and when, in their Constitutions, they widely adopted Magna Charta's "law of the land" guarantee, see, e. g., NC Const, Art XII (1776) ("[N]o freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land"); Mass Const, Art XII (1780) ("[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land"), they almost certainly understood it as Coke did. It was thus as a supposed affirmation of Magna Charta according to Coke that the First Congress (without recorded debate on the issue) included in the proposed Fifth Amendment to the Federal Constitution the provision that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Early commentaries confirm this. See, e. g., 2 W. Blackstone, Commentaries 133, nn 11, 12 (S. Tucker ed 1803); 2 J. Kent, Commentaries on American Law 10 (1827); 3 J. Story, Commentaries on the Constitution of the United States 661 (1833).

This Court did not engage in any detailed analysis of the Due Process Clause until Murray's Lessee v Hoboken Land & Improvement Co. 18 How 272, 15 L Ed 372 (1856). That case involved the validity of a federal statute authorizing the issuance of distress warrants, a mechanism by which the Government collected debts without providing the debtor notice or an opportunity for hearing. The Court noted that the words "due process of law" conveyed "the same meaning as the words 'by the law of the land,' in Magna Charta" (referring to Coke's commentary and early state constitutions), and that

[499 US 30]

they were "a restraint on the legislature as well as on the executive and judicial powers of the government," id., at 276, 15 L Ed 372. This brought the Court to the critical question:

> "To what principles, then, are we to resort to ascertain whether this process enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." Id., at 276-277, 15 L Ed 372.

Reviewing the history of the distress warrant, the Court concluded that the procedure could not deny due process of law because "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues," id., at 277, 15 L Ed 372, and these summary procedures had been replicated, with minor modifications, in the laws of the various American

colonies and, after independence, the States, id., at 278-280, 15 L Ed 372.

Subsequent to the decision in Murray's Lessee, of course, the Fourteenth Amendment was adopted, adding another Due Process Clause to the Constitution. The Court soon reaffirmed the teaching of Murray's Lessee under the new provision:

> "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met *if the trial is had according to the settled course of judicial proceedings.* Due process of law is
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> [499 US 31]
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> process due according to the law of the land." Walker v Sauvinet, 92 US 90, 92-93, 23 L Ed 678 (1876) (emphasis added; citation omitted).

Not until Hurtado v California, 110 US 516, 28 L Ed 232, 4 S Ct 111 (1884), however, did the Court significantly elaborate upon the historical test for due process advanced in Murray's Lessee. In that case, a man convicted of murder in California contended that the State had denied him due process of law by omitting grand-jury indictment. Relying upon Murray's Lessee, he argued that because that procedure was firmly rooted in the Anglo-American common-law tradition, it was an *indispensable* element of due process. The Court disagreed.

> "The real syllabus of [the relevant portion of Murray's Lessee] is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." Hurtado v California, supra, at 528-529, 28 L Ed 232, 4 S Ct 111.

Hurtado, then, clarified the proper role of history in a due process analysis: If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it

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does not necessarily *deny* due process. The remaining business, of course, was to develop a test for determining *when* a departure from historical practice denies due process. Hurtado provided scant guidance. It merely suggested that due process could be assessed in such cases by reference to "those *fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions," 100 US, at 535, 28 L Ed 232, 4 S Ct 111 (emphasis added).

The concept of "fundamental justice" thus entered the due process lexicon not as a description of what due process entails in general, but as a description of what it entails when

traditional procedures are dispensed with. As the Court reiterated in Twining v New Jersey, 211 US 78, 53 L Ed 97, 29 S Ct 14 (1908), "consistently with the requirements of due process, no *change* in ancient procedure can be made which disregards those *fundamental principles,* to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." Id., at 101, 53 L Ed 97, 29 S Ct 14 (emphasis added). See also Maxwell v Dow, 176 US 581, 602-605, 44 L Ed 597, 20 S Ct 448 (1900) (eight-member jury does not violate due process because it is not "a denial of fundamental rights").[1]

Ownbey v Morgan, 256 US 94, 65 L Ed 837, 41 S Ct 433, 17 ALR 873 (1921), provides a classic expression of the Court's "settled usage" doctrine. The Delaware statute challenged in that case provided that a creditor could attach the in-state property of an out-of-state debtor and recover against it without the debtor's being given an opportunity to be heard unless he posted a bond. This procedure could be traced back to 18th-century London, and had been followed in Delaware and other States since colonial days. The Court acknowledged that in general the due process

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guarantee "includ[es] the right to be heard where liberty or property is at stake in judicial proceedings." Id., at 111, 65 L Ed 837, 41 S Ct 433, 17 ALR 873. But, it said, "[a] procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law." Ibid.

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. . . .
>
> "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." Id., at 110-112, 65 L Ed 837, 41 S Ct 433, 17 ALR 873.

See also Corn Exchange Bank v Coler, 280 US 218, 222-223, 74 L Ed 378, 50 S Ct 94 (1930).

By the time the Court decided Snyder v Massachusetts, 291 US 97, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934), its understanding of due process had shifted in a subtle but significant way. That case rejected a criminal defendant's claim that he had been denied due process by being prevented from accompanying his jury on a visit to the scene of the crime. Writing for the Court, Justice Cardozo assumed that due process required "fundamental justice," id.,

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1. During the late 19th century the Court also advanced the view that laws departing from *substantive* common law might violate due process if they denied "fundamental" rights. See, e. g., Allgeyer v Louisiana, 165 US 578, 589, 41 L Ed 832, 17 S Ct 427 (1897). The present analysis deals only with the Court's so-called "procedural" due process jurisprudence.

at 108, 78 L Ed 674, 54 S Ct 330, 90 ALR 575, or "fairness," see id., at 116, 78 L Ed 674, 54 S Ct 330, 90 ALR 575, in *all* cases, and not merely when evaluating nontraditional procedures. The opinion's analysis began from the premise that "Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness *unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.*" Id., at 105, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (emphasis added). Even so,

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however, only the mode of analysis and not the content of the Due Process Clause had changed, since in assessing whether some principle of "fundamental justice" had been violated, the Court was willing to accord historical practice dispositive weight. Justice Cardozo noted that the practice of showing evidence to the jury outside the presence of the defendant could be traced back to 18th-century England, and had been widely adopted in the States. "The Fourteenth Amendment," he wrote, "has not displaced the procedure of the ages." Id., at 111, 78 L Ed 674, 54 S Ct 330, 90 ALR 575.

In the ensuing decades, however, the concept of "fundamental fairness" under the Fourteenth Amendment became increasingly decoupled from the traditional historical approach. The principal mechanism for that development was the incorporation within the Fourteenth Amendment of the Bill of Rights guarantees. Although the Court resisted for some time the idea that "fundamental fairness" necessarily included the protections of the Bill of Rights, see, e. g., Adamson v California, 332 US 46, 54-58, 91 L Ed 1903, 67 S Ct 1672, 171 ALR 1223 (1947); Betts v Brady, 316 US 455, 462, 86 L Ed 1595, 62 S Ct 1252 (1942); Palko v Connecticut, 302 US 319, 323-325, 82 L Ed 288, 58 S Ct 149 (1937), it ultimately incorporated virtually all of them, see, e.g., Malloy v Hogan, 378 US 1, 4-6, 12 L Ed 2d 653, 84 S Ct 1489 (1964); Gideon v Wainwright, 372 US 335, 341-345, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733 (1963). Of course, most of the procedural protections of the federal Bill of Rights simply codified traditional common-law privileges and had been widely adopted by the States. See Robertson v Baldwin, 165 US 275, 281, 41 L Ed 715, 17 S Ct 326 (1897) ("The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors"); T. Cooley, Constitutional Limitations, ch X (4th ed 1878). However, in the days when they were deemed to apply only to the Federal Government and not to impose uniformity upon the States, the Court had interpreted several provisions

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of the Bill of Rights in a way that departed from their strict common-law meaning. Thus, by the mid-20th century there had come to be some considerable divergence between historical practice followed by the States and the guarantees of the Bill of Rights. Gideon, supra, established that no matter how strong its historical pedigree, a procedure prohibited by the Sixth Amendment (failure to appoint counsel in certain criminal cases) violates "fundamental fairness" and must be abandoned by the States.

Id., at 342-345, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733.

To say that unbroken historical usage cannot save a procedure that violates one of the explicit procedural guarantees of the Bill of Rights (applicable through the Fourteenth Amendment) is not necessarily to say that such usage cannot demonstrate the procedure's compliance with the more general guarantee of "due process." In principle, what is important enough to have been included within the Bill of Rights has good claim to being an element of "fundamental fairness," whatever history might say; and as a practical matter, the invalidation of traditional state practices achievable through the Bill of Rights is at least limited to enumerated subjects. But disregard of "the procedure of the ages" for incorporation purposes has led to its disregard more generally. There is irony in this, since some of those who most ardently supported the incorporation doctrine did so in the belief that it was a means of avoiding, rather than producing, a subjective due-process jurisprudence. See, for example, the dissent of Justice Black, author of Gideon, from the Court's refusal to replace "fundamental fairness" with the Bill of Rights as the *sole* test of due process:

> "[T]he 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits
> [499 US 36]
> legislative power." Adamson, supra, at 75, 91 L Ed 1903, 67 S Ct 1672, 171 ALR 1223 (Black, J., dissenting).

In any case, our due process opinions in recent decades have indiscriminately applied balancing analysis to determine "fundamental fairness," without regard to whether the procedure under challenge was (1) a traditional one and, if so, (2) prohibited by the Bill of Rights. See, e.g., Ake v Oklahoma, 470 US 68, 76-87, 84 L Ed 2d 53, 105 S Ct 1087 (1985); Lassiter v Department of Social Services of Durham Cty., 452 US 18, 24-25, 68 L Ed 2d 640, 101 S Ct 2153 (1981); Mathews v Eldridge, 424 US 319, 332-335, 47 L Ed 2d 18, 96 S Ct 893 (1976). Even so, however, very few cases have used the Due Process Clause, without the benefit of an accompanying Bill of Rights guarantee, to strike down a procedure concededly approved by traditional and continuing American practice. Most notably, in Sniadach v Family Finance Corp. of Bay View, 395 US 337, 340, 23 L Ed 2d 349, 89 S Ct 1820 (1969), over the strenuous dissent of Justice Black, the Court declared unconstitutional the garnishment of wages, saying that "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." And in Shaffer v Heitner, 433 US 186, 53 L Ed 2d 683, 97 S Ct 2569 (1977), the Court invalidated general quasi in rem jurisdiction, saying that " 'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitu-

tional heritage," id., at 212, 53 L Ed 2d 683, 97 S Ct 2569. Such cases, at least in their broad pronouncements if not with respect to the particular provisions at issue,[2] were in my view wrongly decided.

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I might, for reasons of stare decisis, adhere to the principle that these cases announce, except for the fact that our later cases give it nothing but lipservice, and by their holdings reaffirm the view that traditional practice (unless contrary to the Bill of Rights) is conclusive of "fundamental fairness." As I wrote last Term in Burnham v Superior Court of Cal., County of Marin, 495 US 604, 623-625, 109 L Ed 2d 631, 110 S Ct 2105 (1990), nothing but the conclusiveness of history can explain why jurisdiction based upon mere service of process within a State—either generally or on the precise facts of that case—is "fundamentally fair." Nor to my mind can anything else explain today's decision that a punishment whose assessment and extent are committed entirely to the discretion of the jury is "fundamentally fair." The Court relies upon two inconsequential factors. First, the "guidance" to the jury provided by the admonition that it "take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." That is not guidance but platitude. Second, review of the *amount* of the verdict by the trial and appellate courts, which are also governed by no discernible standard except what they have done in other cases (unless, presumably, they announce a change). But it would surely not be considered "fair" (or in accordance with due process) to follow a similar procedure outside of this historically approved context—for example, to dispense with meaningful guidance concerning *compensatory* damages, so long as whatever number the jury picks out of the air can be reduced by the trial judge or on appeal. I can conceive of no test relating to "fairness" in the abstract that would approve this procedure, unless it is whether something even more unfair could be imagined. If the imposition of millions of dollars of liability in this hodge-podge fashion fails to "jar [the Court's] constitutional sensibilities," ante, at 18, 113 L Ed 2d, at 20, it is hard to say what would.

When the rationale of earlier cases (Sniadach and Shaffer) is contradicted by later holdings—and particularly when that

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rationale has no basis in constitutional text and itself contradicts opinions never explicitly overruled—I think it has no valid stare decisis claim upon me. Our holdings remain in conflict, no matter which course I take. I choose, then, to take the course that accords with the language of the Constitution and with our interpretation of it through the first half of this century. I reject the principle, aptly described and faithfully followed in Justice O'Connor's dissent, that a traditional procedure of our society becomes unconstitutional whenever

2. In Shaffer, Justice Stevens' concurrence noted that Delaware was the only State that currently exercised quasi in rem jurisdiction in the manner there at issue, viz, on the basis of ownership of stock in a state-chartered corporation, when both owner and custodian of the stock resided elsewhere. See 433 US, at 218, 53 L Ed 2d 683, 97 S Ct 2569 (opinion concurring in judgment). It seems not to have been asserted, moreover, that that manner of exercise had *ever* been a common and established American practice.

the Members of this Court "lose . . . confidence" in it, post, at 63, 113 L Ed 2d, at 49. And like Justice Cardozo in Snyder, I affirm that no procedure firmly rooted in the practices of our people can be so "fundamentally unfair" as to deny due process of law.

Let me be clear about the scope of the principle I am applying. It does not say that every practice sanctioned by history is constitutional. It does not call into question, for example, the case of Williams v Illinois, 399 US 235, 26 L Ed 2d 586, 90 S Ct 2018 (1970), relied upon by both the majority and the dissent, where we held unconstitutional the centuries-old practice of permitting convicted criminals to reduce their prison sentences by paying fines. The basis of that invalidation was not denial of due process but denial to indigent prisoners of equal protection of the laws. The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the "law of the land," and might be thought to have some counter-historical content. Moreover, the principle I apply today does not reject our cases holding that procedures demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practice to the contrary. Thus, it does not call into question the proposition that punitive damages, despite their historical sanction, can violate the First Amendment. See, e. g., Gertz v Robert Welch, Inc. 418 US 323, 349-350, 41 L Ed 2d 789, 94 S Ct 2997

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(1974) (First Amendment prohibits awards of punitive damages in certain defamation suits).

* * *

A harsh or unwise procedure is not necessarily unconstitutional, Corn Exchange Bank, 280 US, at 223, 74 L Ed 378, 50 S Ct 94, just as the most sensible of procedures may well violate the Constitution, see Maryland v Craig, 497 US 836, 860-861, 111 L Ed 2d 666, 110 S Ct 3157 (1990) (Scalia, J., dissenting). State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. See, e. g., Alaska Stat Ann § 09.17.020 (Supp 1990) (punitive damages must be supported by "clear and convincing evidence"); Fla Stat § 768.73(1)(a) (1989) (in specified classes of cases, punitive damages are limited to three times the amount of compensatory damages); Va Code Ann § 8.01-38.1 (Supp 1990) (punitive damages limited to $350,000). It is through those means —State by State, and, at the federal level, by Congress—that the legal procedures affecting our citizens are improved. Perhaps, when the operation of that process has purged a historically approved practice from our national life, the Due Process Clause would permit this Court to announce that it is no longer in accord with the law of the land. But punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive. To effect their elimination may well be wise, but is not the role of the Due Process Clause. "Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." Ownbey, 256 US, at 112, 65 L Ed 837, 41 S Ct 433, 17 ALR 873.

We have expended much ink upon the due-process implications of puni-

tive damages, and the fact-specific nature of the Court's opinion guarantees that we and other courts will expend much more in the years to come. Since jury-assessed punitive damages are a part of our living tradition that dates

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back prior to 1868, I would end the suspense and categorically affirm their validity.

Justice **Kennedy,** concurring in the judgment.

Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair. For this reason, Justice Scalia's historical approach to questions of procedural due process has much to commend it. I cannot say with the confidence maintained by Justice Scalia, however, that widespread adherence to a historical practice always forecloses further inquiry when a party challenges an ancient institution or procedure as violative of due process. But I agree that the judgment of history should govern the outcome in the case before us. Jury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary.

Our legal tradition is one of progress from fiat to rationality. The evolution of the jury illustrates this principle. From the 13th or 14th century onward, the verdict of the jury found gradual acceptance not as a matter of ipse dixit, the basis for verdicts in trials by ordeal which the jury came to displace, but instead because the verdict was based upon rational procedures. See T. Plucknett, A Concise History of the Common Law 120-131 (5th ed 1956). Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts. There is a principled justification too in the composition of the jury, for its representative character permits its verdicts to express the sense of the community.

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Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.

These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity. As we have

said in the capital sentencing context:

> "It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.' " McCleskey v Kemp, 481 US 279, 311, 95 L Ed 2d 262, 107 S Ct 1756 (1987) (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)).

This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case. One must recognize the difficulty of making the showing required to prevail on this theory. In my view, however, it provides firmer guidance and rests on sounder jurisprudential foundations than does the approach

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espoused by the majority. While seeming to approve the common-law method for assessing punitive damages, ante, at 17-18, 113 L Ed 2d, at 19, the majority nevertheless undertakes a detailed examination of that method as applied in the case before us, ante, at 18-24, 113 L Ed 2d, at 20-23. It is difficult to comprehend on what basis the majority believes the common-law method might violate due process in a particular case after it has approved that method as a general matter, and this tension in its analysis now must be resolved in some later case.

In my view, the principles mentioned above and the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change. We do not have the authority, as do judges in some of the States, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination. Were we sitting as state-court judges, the size and recurring unpredictability of punitive damages awards might be a convincing argument to reconsider those rules or to urge a reexamination by the legislative authority. We are confined in this case, however, to interpreting the Constitution, and from this perspective I agree that we must reject the arguments advanced by petitioner.

For these reasons I concur in the judgment of the Court.

Justice **O'Connor,** dissenting.

Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than "do what you think best." See Browning-Ferris Indus-

tries of Vt., Inc. v Kelco Disposal, Inc. 492 US 257, 281, 106 L Ed 2d 219, 109 S Ct 2909 (1989) (Brennan, J., concurring).

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In my view, such instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim. While I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.

The Court today acknowledges that dangers may lurk, but holds that they did not materialize in this case. See ante, at 18-24, 113 L Ed 2d, at 20-23. They did materialize, however. They always do, because such dangers are part and parcel of common-law punitive damages procedures. As is typical, the trial court's instructions in this case provided no meaningful standards to guide the jury's decision to impose punitive damages or to fix the amount. Accordingly, these instructions were void for vagueness. Even if the Court disagrees with me on this point, it should still find that Pacific Mutual was denied procedural due process. Whether or not the jury instructions were so vague as to be unconstitutional, they plainly offered less guidance than is required under the due process test set out in Mathews v Eldridge, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976). The most modest of procedural safeguards would have made the process substantially more rational without impairing any legitimate governmental interest. The Court relies heavily on the State's mechanism for postverdict judicial review, ante, at 20-23, 113 L Ed 2d, at 21-23, but this is incapable of curing a grant of standard-less discretion to the jury. Post hoc review tests only the amount of the award, not the procedures by which that amount was determined. Alabama's common-law scheme is so lacking in fundamental fairness that the propriety of any specific award is irrelevant. *Any* award of punitive damages

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rendered under these procedures, no matter how small the amount, is constitutionally infirm.

Notwithstanding its recognition of serious due process concerns, the Court upholds Alabama's punitive damages scheme. Unfortunately, Alabama's punitive damages scheme is indistinguishable from the common-law schemes employed by many States. The Court's holding will therefore substantially impede punitive damages reforms. Because I am concerned that the Court today sends the wrong signal, I respectfully dissent.

I

Due process requires that a State provide meaningful standards to guide the application of its laws. See Kolender v Lawson, 461 US 352, 358, 75 L Ed 2d 903, 103 S Ct 1855 (1983). A state law that lacks such standards is void for vagueness. The void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest stan-

dardless discretion in the jury to fix a penalty. See United States v Batchelder, 442 US 114, 123, 60 L Ed 2d 755, 99 S Ct 2198 (1979). I have no trouble concluding that Alabama's common-law scheme for imposing punitive damages is void for vagueness.

A

Alabama's punitive damages scheme requires a jury to make two decisions: (1) whether or not to impose punitive damages against the defendant, and (2) if so, in what amount. On the threshold question of whether or not to impose punitive damages, the trial court instructed the jury as follows: "Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it unless this jury *feels* that you should do so." App 105-106 (emphasis added).

This instruction is as vague as any I can imagine. It speaks of discretion, but suggests *no* criteria on which to base the exercise of that discretion. Instead of reminding the jury that its decision must rest on a factual or legal predicate, the instruction suggests that the jury may do whatever

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it "feels" like. It thus invites individual jurors to rely upon emotion, bias, and personal predilections of every sort. As I read the instruction, it as much permits a determination based upon the toss of a coin or the color of the defendant's skin as upon a reasoned analysis of the offensive conduct. This is not "discretion in the legal sense of that term, but . . . mere will. It is purely arbitrary and acknowledges neither guidance nor restraint." Yick Wo v Hopkins, 118 US 356, 366-367, 30 L Ed 220, 6 S Ct 1064 (1886).

Giaccio v Pennsylvania, 382 US 399, 15 L Ed 2d 447, 86 S Ct 518 (1966), offers a compelling analogy. At issue in Giaccio was a statute that left to the discretion of the jury whether or not to assess costs against an acquitted criminal defendant. The statute did not set out any standards to guide the jury's determination. Id., at 401, 15 L Ed 2d 447, 86 S Ct 518. The Court did not hesitate in striking down the statute on vagueness grounds. Id., at 402, 15 L Ed 2d 447, 86 S Ct 518. It reasoned that the utter lack of standards subjected acquitted defendants to "arbitrary and discriminatory impositions of costs." Ibid. Justice Black wrote for the Court:

> "The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says the jurors 'shall determine, by their verdict, whether . . . the defendant, shall pay the costs' . . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement." Id., at 403, 15 L Ed 2d 447, 86 S Ct 518.

Alabama's common-law punitive damages scheme fails for precisely the same reason. It permits a jury to decide whether or not to impose punitive damages "without imposing a single condition, limitation or con-

tingency" on the jury.

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Ibid. The State offers no principled basis for distinguishing those tortfeasors who should be liable for punitive damages from those who should not be liable. Instead, the State delegates this basic policy matter to individual juries "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v City of Rockford, 408 US 104, 108-109, 33 L Ed 2d 222, 92 S Ct 2294 (1972). As in Giaccio, this grant of unchanneled, standardless discretion "does not even begin to meet th[e] constitutional requirement." Giaccio, 382 US, at 403, 15 L Ed 2d 447, 86 S Ct 518.

The vagueness question is not even close. This is not a case where a State has ostensibly provided a standard to guide the jury's discretion. Alabama, making no pretensions whatsoever, gives civil juries complete, unfettered, and unchanneled discretion to determine whether or not to impose punitive damages. Not only that, the State *tells* the jury that it has complete discretion. This is a textbook example of the void-for-vagueness doctrine. Alabama's common-law scheme is unconstitutionally vague because the State entrusts the jury with "such broad and unlimited power . . . that the jurors must make determinations of the crucial issue upon their notions of what the law should be instead of what it is." Ibid.

If anything, this is an easier case than Giaccio. There, the Court struck down on vagueness grounds a Pennsylvania law, under which the monetary penalty that could be assessed by the jury against the defendant was limited to the costs of prosecution—in that case, $230.95. Id., at 400, 15 L Ed 2d 447, 86 S Ct 518. Our scrutiny under the vagueness doctrine intensifies, however, in proportion to the severity of the penalty imposed, see Hoffman Estates v The Flipside, Hoffman Estates, Inc., 455 US 489, 498-499, 71 L Ed 2d 362, 102 S Ct 1186 (1982), and Alabama's punitive damages scheme places no substantive limits on the amount of a jury's award. Pacific Mutual was found liable for punitive damages of $840,000. Ante, at 7, n 2, 113 L Ed 2d, at 12. Even this substantial sum pales by comparison to others handed down by juries

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in the State. See App to Brief for Alabama Defense Lawyers Association as Amicus Curiae 1a-19a (listing Alabama jury verdicts including punitive damages awards as high as $10 million, $25 million, and $50 million).

It is no defense to vagueness that this case concerns a jury instruction rather than a statute. The constitutional prohibition against vagueness does not disappear simply because the state law at issue originated in the courts rather than the legislature. "[I]f anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits." Browning-Ferris, 492 US, at 281, 106 L Ed 2d 219, 109 S Ct 2909 (Brennan, J., concurring). See ante, at 20-22, 113 L Ed 2d, at 21-22. Moreover, the instruction in this case was not an aberration. It tracked virtually word for word Alabama's Pattern Jury Instruction on punitive damages. See Alabama Pattern Jury Instructions, Civil 11.03 (1974).

Nor does it matter that punitive

damages are imposed by civil juries rather than criminal courts. The vagueness doctrine is not limited to criminal penalties. See Hoffman Estates, supra; City of Mesquite v Aladdin's Castle, Inc., 455 US 283, 71 L Ed 2d 152, 102 S Ct 1070 (1982). The Court in Giaccio expressly repudiated this distinction:

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague." 382 US, at 402, 15 L Ed 2d 447, 86 S Ct 518.

Here, as in Giaccio, the civil/criminal distinction is blurry. Unlike compensatory damages, which are purely civil in character, punitive damages are, by definition, punishment. They operate as "private fines levied by civil juries" to advance governmental objectives. Gertz v Robert Welch, Inc.,

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418 US 323, 350, 41 L Ed 2d 789, 94 S Ct 2997 (1974). Because Alabama permits juries to inflict these potentially devastating penalties wholly at random, the State scheme is void for vagueness.

B

If an Alabama jury determines that punitive damages are appropriate in a particular case, it must then fix the amount. Here, the trial court instructed the jury: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and [the] necessity of preventing similar wrong." App 106.

The Court concludes that this instruction sufficiently limited the jury's discretion, ante, at 19-20, 113 L Ed 2d, at 21, but I cannot share this conclusion. Although the instruction ostensibly provided some guidance, this appearance is deceiving. As Justice Brennan said of a similar instruction: "Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of [state] law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." Browning-Ferris, supra, at 281, 106 L Ed 2d 219, 109 S Ct 2909 (concurring opinion). I agree wholeheartedly. Vague references to "the character and the degree of the wrong" and the "necessity of preventing similar wrong" do not assist a jury in making a reasoned decision; they are too amorphous. They restate the overarching principles of punitive damages awards—to punish and deter—without adding meaning to these terms. For example, the trial court did not suggest what relation, if any, should exist between the harm caused and the size of the award, nor how to measure the deterrent effect of a particular award. It provided no information to the jury about criminal fines for comparable conduct or the range of punitive damages awards in similar cases. Nor did it identify the

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limitations dictated by retributive and deterrent principles, or advise the jury to refrain from awarding

more than necessary to meet these objectives. In short, the trial court's instruction identified the ultimate destination, but did not tell the jury how to get there. Due process may not require a detailed roadmap, but it certainly requires directions of some sort.

Giaccio is instructive in this inquiry. There, the State argued that even if the cost-assessment statute was impermissibly vague as written, subsequent state court decisions had adopted meaningful standards for implementing it. The jury in Giaccio was thus instructed that it could assess costs against the defendant if it found that he was guilty of misconduct that, while not a criminal offense, warranted a penalty. See Giaccio, 382 US, at 404, 15 L Ed 2d 447, 86 S Ct 518. This Court did not accept that this nebulous instruction cured the statute's vagueness. "It may possibly be that the trial court's charge comes nearer to giving a guide to the jury than those that preceded it, but it still falls short of the kind of legal standard due process requires." Ibid.

The trial court's instruction in this case fares no better. In fact, the minimal guidance it offered may well have pushed the jury further away from reasoned decisionmaking. Paraphrased slightly, the court's terse instruction told the jury: "Think about how much you hate what the defendants did and teach them a lesson." This is not the sort of instruction likely to produce a fair, dispassionate verdict. Like most common-law punitive damages instructions, this one has "an open-ended, anything-goes quality that can too easily stoke . . . the vindictive or sympathetic passions of juries." P. Huber, Liability: The Legal Revolution and Its Consequences 118 (1988) (hereinafter Huber). Our cases attest to the wildly unpredictable results and glaring unfairness that characterize common-law punitive damages procedures. See infra, at 54-55, 113 L Ed 2d, at 43-44.

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One need not look far to see that these so-called standards provide no guidance to Alabama juries. Consider, for example, a recent Alabama case involving a collision between a train and a tractor-trailer truck, which resulted in the death of the driver of the truck. Notwithstanding that the truck pulled onto the tracks right in front of the train, thereby ignoring a stop sign, three warning signs, and five speed bumps, the administratrix of decedent's estate asked for $3 million in punitive damages. The jury, after receiving instructions no more vague than those at issue here, awarded her $15 million. Whitt v Burlington Northern R. Co., No. CV-85-311 (Cir Ct Ala, Aug. 23, 1988), aff'd conditionally, 575 So 2d 1011 (1990) (remitting award to $5 million), stay granted, No. A-408 (90-1250) (Dec. 5, 1990) (Kennedy, J., Circuit Justice).

That Alabama's "standards" in fact provide no guidance whatsoever was illustrated quite dramatically by Alabama Supreme Court Justice Houston in his concurring opinion in Charter Hospital of Mobile, Inc. v Weinberg, 558 So 2d 909, 916 (Ala 1990). He pointed to two cases involving substantially the same misconduct and jury instructions, but having very different results: Washington Nat. Ins. Co. v Strickland, 491 So 2d 872 (Ala 1985), and Land & Associates, Inc. v Simmons, 562 So 2d 140 (Ala 1989). In both cases, an

insurance agent misrepresented to a prospective insured that coverage would begin as soon as the insured paid the first premium when, in reality, the agent should have known that coverage was conditioned upon a medical examination that the insured was unlikely to pass. See Strickland, supra, at 873, 877; Simmons, supra, at 142. In one case, the jury handed down a punitive damages award of approximately $21,000—15½ times the compensatory damages. See Strickland, supra, at 874. In the other case, the jury penalized substantially the same conduct with a punitive damages award of $2,490,000—249 times the compensatory award. See Simmons, supra, at 151 (Houston, J., concurring specially).

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These vastly disparate results demonstrate that, under Alabama's common-law scheme, any case-to-case consistency among verdicts is purely fortuitous.

This is not a case where more precise standards are either impossible or impractical. See Kolender, 461 US, at 361, 75 L Ed 2d 903, 103 S Ct 1855. Just the opposite. The Alabama Supreme Court has already formulated a list of seven factors that it considers relevant to the size of a punitive damages award:

> " '(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
>
> " '(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
>
> " '(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
>
> " '(4) The financial position of the defendant would be relevant.
>
> " '(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> " '(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
>
> " '(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages
>
> [499 US 52]
>
> award.' " Green Oil Co. v Hornsby, 539 So 2d 218, 223-224 (1989), quoting Aetna Life Ins. Co. v Lavoie, 505 So 2d 1050, 1062 (Ala 1987) (Houston, J., concurring specially).

In my view, these standards—the "Green Oil factors"—could assist juries to make fair, rational decisions. Unfortunately, Alabama courts do not give the Green Oil factors to the jury. See 539 So 2d, at 224 (Maddox, J., concurring specially). Instead, the jury has standardless discretion to

impose punitive damages whenever and in whatever amount it wants. The Green Oil factors play a role only *after* the jury has rendered its verdict. The trial court and other reviewing courts may—but are not required to—take these factors into consideration in determining whether a punitive damages award is excessive. Id., at 223.

Obviously, this post hoc application of the Green Oil factors does not cure the vagueness of the jury instructions. Cf. Baggett v Bullitt, 377 US 360, 373, 12 L Ed 2d 377, 84 S Ct 1316 (1964) ("[J]udicial safeguards do not neutralize the vice of a vague law"). See also Roberts v United States Jaycees, 468 US 609, 629, 82 L Ed 2d 462, 104 S Ct 3244 (1984). As respondents candidly admit, judicial review in Alabama is limited to the *amount* of the award. The void-for-vagueness doctrine, on the other hand, is concerned with the *procedures* by which the amount is determined. After-the-fact review of the amount in no way diminishes the fact that the State entrusts its juries with standardless discretion. It thus does not matter that the amount settled upon by the jury might have been permissible under a rational system. Even a wholly irrational process may, on occasion, stumble upon a fair result. What is crucial is that the existing system is not rational. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." Mathews v Eldridge, 424 US, at 344, 47 L Ed 2d 18, 96 S Ct 893. The state court justice who devised the Green Oil factors, Justice Houston, has recognized this. Addressing a vagueness challenge

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to the State's punitive damages procedures, he wrote: "We have attempted to deal with the issue of the reliability of punitive damages assessments by post-trial review only. *That attempt does not really address the issue.*" Charter Hospital, 558 So 2d, at 915 (opinion concurring specially) (emphasis added; citations omitted).

II

For the reasons stated above, I would hold that Alabama's common-law punitive damages scheme is void for vagueness. But the Court need not agree with me on this point in order to conclude that Pacific Mutual was denied procedural due process. Whether or not the Court agrees that the jury instructions were so vague as to be unconstitutional, there can be no doubt but that they offered substantially less guidance than is possible. Applying the test of procedural due process set out in Mathews v Eldridge, supra, more guidance was required. Modest safeguards would make the process significantly more rational without impairing any legitimate governmental interest.

A

In Mathews v Eldridge, supra, at 334, 47 L Ed 2d 18, 96 S Ct 893, we recognized that " ' "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Cafeteria Workers v McElroy, 367 US 886, 895 [6 L Ed 2d 1230, 81 S Ct 1743] (1961).' " "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v Brewer, 408 US 471, 481, 33 L Ed 2d 484, 92 S Ct 2593 (1972). Accordingly, Mathews described a sliding-

scale test for determining whether a particular set of procedures was constitutionally adequate. We look at three factors: (1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can effect a cure; and (3) the governmental interest in avoiding these additional procedures. Mathews, supra, at 335, 47 L Ed 2d 18, 96 S Ct 893.

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Applying the Mathews test to Alabama's common-law punitive damages scheme, it is clear that the state procedures deprive defendants of property without due process of law. The private property interest at stake is enormous. Without imposing any legislative or common-law limits, Alabama authorizes juries to levy civil fines ranging from zero to tens of millions of dollars. Indeed, a jury would not exceed its discretion under state law by imposing an award of punitive damages that was deliberately calculated to bankrupt the defendant. Unlike compensatory damages, which are tied to an actual injury, there is no objective standard that limits the amount of punitive damages. Consequently, " 'the impact of these windfall recoveries is unpredictable and potentially substantial.' " Bankers Life & Casualty Co. v Crenshaw, 486 US 71, 87, 100 L Ed 2d 62, 108 S Ct 1645 (1988) (O'Connor, J., concurring in part and concurring in judgment), quoting Electrical Workers v Foust, 442 US 42, 50, 60 L Ed 2d 698, 99 S Ct 2121 (1979).

Compounding the problem, punitive damages are quasi-criminal punishment. Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards.

The second Mathews prong focuses on the fairness and reliability of existing procedures. This is a question we have spoken to before. Over the last 20 years, the Court has repeatedly criticized common-law punitive damages procedures on the ground that they invite discriminatory and otherwise illegitimate awards. E. g., Gertz, 418 US, at 350, 41 L Ed 2d 789, 94 S Ct 2997 (common-law procedures leave juries "free to use their discretion selectively to punish expressions of unpopular

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views"); Electrical Workers, supra, at 50-51, and n 14, 60 L Ed 2d 698, 99 S Ct 2121 ("[P]unitive damages may be employed to punish unpopular defendants"); Rosenbloom v Metromedia, Inc. 403 US 29, 84, 29 L Ed 2d 296, 91 S Ct 1811 (1971) (Marshall, J., dissenting) ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others"); Smith v Wade, 461 US 30, 59, 75 L Ed 2d 632, 103 S Ct 1625 (1983) (Rehnquist, J., dissenting) ("[P]unitive damages are frequently based upon the caprice and prejudice of jurors"). For this reason, the Court has forbidden the award of punitive damages in certain defamation suits brought by private plaintiffs, Gertz, supra, at 349-350, 41 L Ed 2d 789, 94

S Ct 2997, and in unfair representation suits brought against labor unions under the Railway Labor Act, Electrical Workers, supra, at 52, 60 L Ed 2d 698, 99 S Ct 2121.

Although our cases have not squarely addressed the due process question before us today, see Browning-Ferris, 492 US, at 276-277, 106 L Ed 2d 219, 109 S Ct 2909, we have strongly hinted at the answer. See ante, at 9-12, 113 L Ed 2d, at 14-16. Justice Brennan and Justice Marshall joined the Court's opinion in Browning-Ferris, but wrote separately to express their "understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 492 US, at 280, 106 L Ed 2d 219, 109 S Ct 2909 (Brennan, J., concurring). In a separate opinion that Justice Stevens joined, I voiced strong concerns "regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." Id., at 283, 106 L Ed 2d 219, 109 S Ct 2909 (opinion concurring in part and dissenting in part). This echoed my earlier statement, with which Justice Scalia joined, in Bankers Life, supra, at 88, 100 L Ed 2d 62, 108 S Ct 1645: "This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process" (opinion concurring in part and concurring in judgment).

As explained above, see supra, at 52-53, 113 L Ed 2d, at 41-42, Alabama's grant of standardless discretion to juries is not remedied by post hoc judicial review. At best, this mechanism tests whether the award is grossly excessive. This is an important substantive

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due process concern, but our focus here is on the requirements of procedural due process. Cf. Santosky v Kramer, 455 US 745, 757, 71 L Ed 2d 599, 102 S Ct 1388 (1982) ("Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard").

Even if judicial review of award amounts could potentially minimize the evils of standardless discretion, Alabama's review procedure is not up to the task. For one thing, Alabama courts cannot review whether a jury properly applied permissible factors, because juries are not told which factors are permissible and which are not. See Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va L Rev 269, 290 (1983) (hereinafter Wheeler). Making effective review even more unlikely, the primary component of Alabama's review mechanism is deference. The State Supreme Court insists that a jury's award of punitive damages carries a "presumption of correctness" that a defendant must overcome before remittitur is appropriate. Green Oil, 539 So 2d, at 222, 224. Reviewing courts are thus required to uphold the jury's exercise of unbridled, unchanneled, standardless discretion unless the amount happened upon by the jury cannot be reconciled with even the most generous application of the Green Oil factors.

That is precisely what happened here. When Pacific Mutual challenged the State's procedures governing awards of punitive damages, the trial court simply deferred to the jury. The judge noted that he "would

in all likelihood have rendered a lesser amount," App to Pet for Cert A-15, but that the verdict was not excessive or unfair because "[t]he jury was composed of male and female, white and black and . . . acted conscientiously throughout the trial." Ibid. Relying on the trial judge's refusal to disturb the verdict, the State Supreme Court afforded it a double dose of deference, stating that "jury verdicts are presumed correct, and that presumption

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is strengthened when the presiding judge refuses to grant a new trial." 553 So 2d 537, 543 (1989).

This strong deference is troubling given that the Alabama Supreme Court has explicitly acknowledged that its current procedures provide for " 'unguided discretion,' " Green Oil, 539 So 2d, at 222, and in no way dictate a rational jury verdict: " 'The current system furnishe[s] virtually no yardstick for measuring the amount of the award over against the purpose of the award.' " Ibid., quoting Ridout's-Brown Service, Inc. v Holloway, 397 So 2d 125, 127-128 (Ala 1981) (Jones, J., concurring specially). "[I]t is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of [punishment and deterrence] goals." 539 So 2d, at 222. Thus, the State Supreme Court recognizes that its common-law procedures produce irrational results, yet insists on deferring to these results. Blind adherence to the product of recognized procedural infirmity is not judicial review as I understand it. It is an empty exercise in rationalization that creates only the appearance of evenhanded justice.

Crucial to Mathews' second prong, the procedural infirmities here are easily remedied. The Alabama Supreme Court has already given its approval to the Green Oil factors. By giving these factors to juries, the State would be providing them with some specific standards to guide their discretion. This would substantially enhance the fairness and rationality of the State's punitive damages system. Other procedural safeguards might prove equally effective. For example, state legislatures could establish fixed monetary limits for awards of punitive damages for particular kinds of conduct. So long as the legislatively determined ranges are sufficiently narrow, they could function as meaningful constraints on jury discretion while at the same time permitting juries to render individualized verdicts.

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Another possibility advocated by several commentators, see ante, at 23, n 11, 113 L Ed 2d, at 23; Wheeler 300-301, is that States could bifurcate trials into liability and punitive damages stages. At the punitive damages stage, clear and convincing evidence that the defendant acted with the requisite culpability would be required. This would serve two goals. On a practical level, the clear-and-convincing-evidence requirement would constrain the jury's discretion, limiting punitive damages to the more egregious cases. This would also permit closer scrutiny of the evidence by trial judges and reviewing courts. See Ellis, Punitive Damages, Due Process, and the Jury, 40 Ala L Rev 975, 995-996 (1989). On a symbolic level, the higher evidentiary standard would signal to the jury that it should have a high level of confidence in its factual findings before imposing puni-

tive damages. Id., at 995; Wheeler 297-298. Any of these rudimentary modifications would afford more meaningful guidance to juries, thereby lessening the chance of arbitrary and discriminatory awards, without impairing the State's legitimate interests in punishment and deterrence. Given the existence of several equally acceptable methods, concerns of federalism and judicial restraint counsel that this Court should not legislate to the States which particular method to adopt. I would thus leave it to individual States to decide what method is most consistent with their objectives.

The final Mathews factor asks whether the State has a legitimate interest in preserving standardless jury discretion that is so compelling as to render even modest procedural reforms unduly burdensome. The Court effectively answered this question in Gertz, 418 US, at 349, 41 L Ed 2d 789, 94 S Ct 2997, announcing that "the States have *no substantial interest* in securing for plaintiffs . . . gratuitous awards of money damages far in excess of actual injury." (Emphasis added.)

Respondents do not give up easily. They point out that the State has a substantial interest in deterring wrongful conduct and draw from this a peculiar argument. They contend

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that, by making jury awards more predictable, procedural safeguards will tend to diminish the deterrent effect of punitive damages. If award amounts are predictable, they argue, corporations will not avoid wrongdoing; instead, they will merely calculate the probability of a punitive damages award and factor it in as a cost of doing business. Accordingly, to best advance the State's interest in deterrence, juries must be given unbridled discretion to render awards that are wildly unpredictable.

This argument goes too far. While the State has a legitimate interest in avoiding rigid strictures so that a jury may tailor its award to specific facts, the Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim. The procedural reforms suggested here in no way intrude on the jury's ability to exercise reasoned discretion, nor do they preclude flexible decision-making. Due process requires only that a jury be given a measurable degree of guidance, not that it be straight-jacketed into performing a particular calculus.

Similarly, the suggested procedural safeguards do not impair the State's punishment objectives. Admittedly, the State has a strong interest in punishing wrongdoers, but it has no legitimate interest in maintaining in pristine form a common-law system that imposes disproportionate punishment and that subjects defendants guilty of similar misconduct to wholly different punishments. Due process requires, at some level, that punishment be commensurate with the wrongful conduct. See Solem v Helm, 463 US 277, 284-290, 77 L Ed 2d 637, 103 S Ct 3001 (1983); id., at 311, n 3, 77 L Ed 2d 637, 103 S Ct 3001 (Burger, C. J., dissenting). The State can therefore have no valid objection to procedural measures that merely ensure that

punitive damages awards
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are based on some factual or legal predicate, rather than the personal predilections and whims of individual jurors.

B

In his concurrence, Justice Scalia offers a very different notion of what due process requires. He argues that a practice with a long historical pedigree is immune to reexamination. Ante, at 38, 113 L Ed 2d, at 33. The Court properly rejects this argument. Ante, at 18, 113 L Ed 2d, at 20. A static notion of due process is flatly inconsistent with Mathews, 424 US, at 334-335, 47 L Ed 2d 18, 96 S Ct 893, in which this Court announced that the requirements of the Due Process Clause are "'flexible'" and may vary with "'time, place and circumstances.'" We have repeatedly relied on the Mathews analysis, and our recent cases leave no doubt as to its continued vitality. See, e. g., Washington v Harper, 494 US 210, 229, 108 L Ed 2d 178, 110 S Ct 1028 (1990); Brock v Roadway Express, Inc. 481 US 252, 261-262, 95 L Ed 2d 239, 107 S Ct 1740 (1987); Walters v National Assn. of Radiation Survivors, 473 US 305, 320-321, 87 L Ed 2d 220, 105 S Ct 3180 (1985); Cleveland Bd. of Educ. v Loudermill, 470 US 532, 542-543, 84 L Ed 2d 494, 105 S Ct 1487 (1985); Ake v Oklahoma, 470 US 68, 77, 84 L Ed 2d 53, 105 S Ct 1087 (1985); Schall v Martin, 467 US 253, 274, 81 L Ed 2d 207, 104 S Ct 2403 (1984).

Due process is not a fixed notion. Procedural rules, "even ancient ones, must satisfy contemporary notions of due process." Burnham v Superior Court of Cal., County of Marin, 495 US 604, 630, 109 L Ed 2d 631, 110 S Ct 2105 (1990) (Brennan, J., concurring in judgment). Although history creates a strong presumption of continued validity, "the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid." Id., at 628, 109 L Ed 2d 631, 110 S Ct 2105 (White, J., concurring in part and concurring in judgment), citing Shaffer v Heitner, 433 US 186, 53 L Ed 2d 683, 97 S Ct 2569 (1977).

The Court's decision in Williams v Illinois, 399 US 235, 26 L Ed 2d 586, 90 S Ct 2018 (1970), is also instructive. In Williams, the Court invalidated on equal protection grounds the time-honored practice of extending prison terms beyond the statutory maximum
[499 US 61]
when a defendant was unable to pay a fine or court costs. The Court's language bears repeating:

"[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . .

"The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country." Id., at 239-240, 26 L Ed 2d 586, 90 S Ct 2018.

Punitive damages are similarly ripe for reevaluation. In the past, such awards "merited scant attention" because they were "rarely assessed and likely to be small in amount." Ellis, Fairness and Efficiency in the Law of Punitive Dam-

ages, 56 S Cal L Rev 1, 2 (1982). When awarded, they were reserved for the most reprehensible, outrageous, or insulting acts. See F. Pollock, Law of Torts (1887); Huber 119. Even then, they came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. Punitive damages filled this gap. See K. Redden, Punitive Damages § 2.3(A) (1980); Note, Exemplary Damages in the Law of Torts, 70 Harv L Rev 517, 519-520 (1957).

Recent years, however, have witnessed an explosion in the frequency and size of punitive damages awards. See RAND Institute for Civil Justice, M. Peterson, S. Sarma, & M. Shanley, Punitive Damages—Empirical Findings iii (1987) (hereinafter RAND). A recent study by the RAND Corporation found that punitive damages were assessed against one of every ten defendants who were found liable for compensatory damages in California. Id., at viii. The amounts can be staggering. Within nine months of our decision in Browning-Ferris, there were no fewer than six punitive damages awards of more than $20 million. Crovitz, Absurd Punitive Damages Also "Mock" Due Process, Wall St.

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Journal, Mar. 14, 1990, p A19, col 3. Medians as well as averages are skyrocketing, meaning that even routine awards are growing in size. RAND vi, ix, 65. The amounts "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint." Oki America, Inc. v Microtech Int'l, Inc. 872 F2d 312, 315 (CA9 1989) (Kozinski, J., concurring).

Much of this is attributable to changes in the law. For 200 years, recovery for breach of contract has been limited to compensatory damages. In recent years, however, a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith. See, e. g., Seaman's Direct Buying Serv., Inc. v Standard Oil Co., 36 Cal 3d 752, 686 P2d 1158 (1984). Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards. See RAND iv. Other significant legal developments include the advent of product liability and mass tort litigation. "As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. . . . Since then, awards more than 30 times as high have been sustained on appeal." Browning-Ferris, 492 US, at 282, 106 L Ed 2d 219, 109 S Ct 2909 (O'Connor, J., concurring in part and dissenting in part). "Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala L Rev 919 (1989).

As in Williams, the time has come to reassess the constitutionality of a time-honored practice. The explosion in the frequency and size of punitive damages awards has exposed the constitutional defects that inhere in the common-law system. That we did not discover these defects earlier is regrettable, but it does not mean that we can pretend that they do not exist now. "[N]ew cases expose old infirmities which

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apathy or absence of challenge has permitted to stand. But the constitutional imperatives

. . . must have priority over the comfortable convenience of the status quo." Williams, 399 US, at 245, 26 L Ed 2d 586, 90 S Ct 2018. Circumstances today are different than they were 200 years ago, and nothing in the Fourteenth Amendment requires us to blind ourselves to this fact. See Wheeler 277. Just the opposite is true. The Due Process Clause demands that we possess some degree of confidence that the procedures employed to deprive persons of life, liberty, and property are capable of producing fair and reasonable results. When we lose that confidence, a change must be made.

III

" 'The touchstone of due process is protection of the individual against arbitrary action of government.' " Daniels v Williams, 474 US 327, 331, 88 L Ed 2d 662, 106 S Ct 662 (1986), quoting Dent v West Virginia, 129 US 114, 123, 32 L Ed 623, 9 S Ct 231 (1889). Alabama's common-law scheme for awarding punitive damages provides a jury with "such skeletal guidance," Browning-Ferris, supra, at 281, 106 L Ed 2d 219, 109 S Ct 2909 (Brennan, J., concurring), that it invites—even requires—arbitrary results. It gives free reign to the biases and prejudices of individual jurors, allowing them to target unpopular defendants and punish selectively. In short, it is the antithesis of due process. It does not matter that the system has been around for a long time, or that the result in this particular case may not seem glaringly unfair. The common-law scheme yields unfair and inconsistent results "in so many instances that it should be held violative of due process in every case." Burnham, 495 US, at 628, 109 L Ed 2d 631, 110 S Ct 2105 (White, J., concurring in part and concurring in judgment).

I would require Alabama to adopt some method, either through its legislature or its courts, to constrain the discretion of juries in deciding whether or not to impose punitive damages and in fixing the amount of such awards. As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which

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they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.

This conclusion is neither groundbreaking nor remarkable. It reflects merely a straightforward application of our Due Process Clause jurisprudence. Given our statements in recent cases such as Browning-Ferris, supra, and Bankers Life & Casualty Co. v Crenshaw, 486 US 71, 100 L Ed 2d 62, 108 S Ct 1645 (1988), the parties had every reason to expect that this would be the Court's holding. Why, then, is it consigned to a dissent rather than a majority opinion? It may be that the Court is reluctant to afford procedural due process to Pacific Mutual because it perceives that such a ruling would force us to evaluate the constitutionality of every State's punitive damages scheme. I am confident, though, that if we announce what the Constitution requires and allow the States sufficient flexibility to respond, the constitutional problems will be resolved in time without any undue burden on the federal courts. Indeed, it may have been our hesitation that has inspired a flood of petitions for certiorari. For more than 20 years, this Court has criticized common-law punitive damages procedures, see supra, at 54-55, 113 L Ed 2d, at 43, but has

shied away from its duty to step in, hoping that the problems would go away. It is now clear that the problems are getting worse, and that the time has come to address them squarely. The Court does address them today. In my view, however, it offers an incorrect answer.

[499 US 65]

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, Petitioner

v

JOSEPH E. O'NEILL et al.

499 US 65, 113 L Ed 2d 51, 111 S Ct 1127

[No. 89-1493]

Argued January 14, 1991. Decided March 19, 1991.

Decision: Union's agreement to settle strike held, under circumstances presented, not arbitrary or discriminatory and thus not breach of union's duty of fair representation.

SUMMARY

In 1983, an airline filed a petition for reorganization under Chapter 11 of the Bankruptcy Code and, with the approval of the Bankruptcy Court, repudiated its collective bargaining agreement with the union that represented the airline's pilots. In response, the pilots called a strike that lasted for more than 2 years. The strike was acrimonious, with incidents of violence and the filing of lawsuits, charges, and countercharges. Although most of the approximately 2,000 pilots originally supported the strike, about 600 of them were working by August 1985, along with about 1,000 replacement workers hired by the airline. In September 1985, the airline announced that it would fill a large number of anticipated vacancies by using a system that allowed pilots to bid for positions. In the past, this system had assigned positions by seniority. Although the union authorized striking pilots to submit bids, the airline announced that all the positions had been awarded to working pilots. On October 31, 1985, the union and the airline reached an agreement to end the strike, dispose of all pending litigation, and reallocate the vacant positions. Under the agreement, which was approved by the Bankruptcy Court, striking pilots were offered the options of (1) settling all outstanding claims with the airline and participating with nonstriking pilots in the allocation of certain positions, (2) electing not to return to work and receiving severance pay, or (3) retaining their individual claims against the airline and becoming eligible to work only after the reinstatement of all the settling pilots. Pursuant to the settlement, some positions were awarded to returning strikers who chose the first option,

Briefs of Counsel, p 745, infra.

while almost a third of the former striking pilots chose the lump-sum severance payment rather than reinstatement. However, several former striking pilots brought a class action in Federal District Court against the union. These pilots alleged, among other things, that the union had breached its duty of fair representation in negotiating and accepting the settlement, in that the settlement arbitrarily discriminated against striking pilots. The District Court granted the union's motion for summary judgment on the alternative grounds that (1) the Bankruptcy Court had approved the settlement, and (2) even if the settlement was merely a private agreement, the union had not breached its duty of fair representation. The United States Court of Appeals for the Fifth Circuit, reversing and remanding on appeal, said that (1) the rule that a union breaches its duty of fair representation if the union's actions are either arbitrary, discriminatory, or in bad faith, applies to a union in its negotiating capacity, and (2) a jury could have found that the union had acted arbitrarily and had thus breached its duty of fair representation, because the jury could have found that the settlement had left the striking pilots in a substantially worse position than would have been the case if the union had surrendered to the airline without a settlement (886 F2d 1438).

On certiorari, the United States Supreme Court reversed. In an opinion by STEVENS, J., expressing the unanimous view of the court, it was held that (1) the rule that a union breaches its duty of fair representation if the union's actions are either arbitrary, discriminatory, or in bad faith, applies to all union activity, including not only contract administration and enforcement but also contract negotiation; (2) a union's actions are arbitrary, so as to constitute a breach of the duty of fair representation, only if—in light of the factual and legal landscape at the time of the union's actions—the union's behavior is so far outside a wide range of reasonableness as to be irrational; (3) under the circumstances, the union's agreement to settle the strike was not arbitrary, so as to constitute a breach of the duty of fair representation—even if it were to be assumed that the settlement was worse than the result that the union would have obtained by unilateral termination of the strike—because (a) the law existing at the time of the settlement was not clear that the positions in question were vacancies, or that the striking pilots had a right to such positions by virtue of having greater seniority than the nonstriking pilots, (b) it was rational for the union to recognize the possibility that an attempted voluntary return to work would merely precipitate litigation over the right to the positions in question, and that the airline might not abandon its bargaining position without a complete settlement, (c) the settlement at least produced certain and prompt access to a share of the new jobs and avoided the costs and risks associated with major litigation, and (d) the settlement was presumably viewed by a significant number of striking pilots as more advantageous than a surrender; and (4) the agreement to settle did not invidiously discriminate between striking and nonstriking pilots so as to constitute a breach of the union's duty of fair representation, since (a) it was rational, under the circumstances, for the union to accept a compromise between the claims of the two groups of pilots, and (b) the agreement did not permanently alter the seniority system.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Labor § 39 — union's duty of fair representation

1a-1c. The rule that a union breaches its duty of fair representation if the union's actions are either arbitrary, discriminatory, or in bad faith, applies to all union activity, including not only contract administration and enforcement but also contract negotiation.

Labor § 39 — union's duty of fair representation — arbitrary action

2a, 2b. With respect to a union's treatment of its members, the union's actions are arbitrary, so as to constitute a breach of the duty of fair representation, only if—in light of the factual and legal landscape at the time of the union's actions—the union's behavior is so far outside a

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48 Am Jur 2d, Labor and Labor Relations §§ 398-400, 407, 1151, 1152

23 Federal Procedure, L Ed, Labor and Labor Relations §§ 52:2013-52:2019

15 Am Jur Proof of Facts 2d 65, Union's Breach of Duty of Fair Representation

29 USCS §§ 141 et seq.; 45 USCS §§ 151 et seq.

RIA Employment Coordinator ¶¶ LR-44,841—LR-44,843, LR-44,859

L Ed Digest, Labor § 39

L Ed Index, Arbitrary Acts or Matters; Labor and Employment

Index to Annotations, Arbitrariness; Labor and Employment

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Union's duty of fair representation in merging seniority lists. 42 ALR Fed 69.

Preferential treatment as respects seniority of replacement or nonstriking employees, or returning strikers, as unfair labor practice. 94 ALR2d 1161.

Validity and construction of labor contract provision modifying or destroying seniority rights under prior contract. 90 ALR2d 1003.

wide range of reasonableness as to be irrational.

Labor §§ 22, 39 — collective bargaining — court review of union's performance — duty of fair representation

3a, 3b. It is Congress' intent that the parties to a collective bargaining process should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences; any substantive examination by a court of a union's performance in the collective bargaining process must be highly deferential, in recognition of the wide latitude that negotiators need for the effective performance of their bargaining responsibilities, because (1) Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union, but rather (2) Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature; therefore, the final product of the bargaining process may constitute evidence of a breach of the union's duty of fair representation only if that product can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary.

Labor § 39 — representation by union

4. The exercise of a labor union's granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.

Attorneys § 17; Corporations § 101; Labor § 39; Trusts § 34 — union's duty of fair representation — fiduciary duties

5. A union's duty of fair representation is akin to the duty owed by other fiduciaries to their beneficiaries; the fair representation duty parallels the responsibilities of corporate officers and directors toward shareholders; just as such fiduciaries as trustees, attorneys, and corporate officers and directors owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith.

Labor § 39 — representation of employees — range of reasonableness

6. The rule that a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion, (1) does not limit review of a union's actions to a determination of the union's good faith and honesty of purpose, but rather (2) recognizes that a union's conduct must also be within a wide range of reasonableness.

Labor § 39 — union's duty of fair representation — strike settlement — arbitrariness

7a-7d. An airline pilot union's agreement to settle a strike against an airline—under which agreement the striking pilots are offered the options of (1) settling all outstanding claims with the airline and participating with nonstriking pilots in the allocation of certain positions, (2) electing not to return to work and receiving severance pay, or (3) retaining their individual claims against the airline and becoming eligible to work only after the reinstatement of all the settling pilots—is not arbitrary, so as to constitute a

breach of the union's duty of fair representation, even if it is assumed that the settlement is worse than the result that the union would have obtained by unilateral termination of the strike, where the airline has stated, prior to the time of the settlement, that all the positions in question have been awarded to nonstriking pilots and that none of the strikers have any claim on any of those jobs; viewed in light of the legal landscape at the time of the settlement, the union's decision to settle rather than surrender and voluntarily terminate the strike is by no means irrational, but rather is within the wide range of reasonableness that a union is allowed in its bargaining, where (1) the law existing at the time of the settlement is not clear that the positions in question are vacancies, or that the striking pilots have a right to such positions by virtue of having greater seniority than the nonstriking pilots, (2) given the background of determined resistance by the airline at all stages of the strike, it is rational for the union to recognize the possibility that an attempted voluntary return to work would merely precipitate litigation over the right to the positions in question, and that the airline might not abandon its bargaining position without a complete settlement, (3) the settlement at least produces certain and prompt access to a share of the new jobs and avoids the costs and risks associated with major litigation, and (4) given that almost a third of the striking pilots have chosen the lump-sum severance payment rather than reinstatement, the settlement is presumably viewed by a significant number of striking pilots as more advantageous than a surrender.

Courts § 766 — precedents

8a, 8b. A case decided by the United States Court of Appeals for the Seventh Circuit does not control the outcome in a dispute in the United States Court of Appeals for the Fifth Circuit.

Courts § 767 — rules of decision — precedents — limitation of authority — labor cases

9. Cases decided under the National Labor Relations Act (NLRA) (29 USCS §§ 141 et seq.) are not necessarily controlling in situations which are governed by the Railway Labor Act (RLA) (45 USCS §§ 151 et seq.); thus, it is error for a United States Court of Appeals to assume that the law is clear that striking airline pilots have a right to certain positions by virtue of having greater seniority than crossover and replacement workers, where—although the case is governed by the RLA—the court relies solely on United States Supreme Court cases that interpret the NLRA.

Labor § 39 — union's duty of fair representation — strike settlement — discrimination

10. An airline pilot union's agreement to settle a strike against an airline—under which agreement the striking pilots are offered the options of (1) settling all outstanding claims with the airline and participating with nonstriking pilots in the allocation of certain positions, (2) electing not to return to work and receiving severance pay, or (3) retaining their individual claims against the airline and becoming eligible to work only after the reinstatement of all the settling pilots—does not invidiously discriminate between striking and nonstriking pilots so as to constitute a breach of the union's duty of fair representation, where (1) it is ra-

tional, under the circumstances, for the union to accept a compromise between the claims of the two groups of pilots, and (2) the agreement does not permanently alter the seniority system but rather (a) provides the order and mechanism for the reintegration of the returning strikers, and (b) preserves the seniority of the striking pilots after their initial reinstatement.

SYLLABUS BY REPORTER OF DECISIONS

After Continental Airlines, Inc., filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, it repudiated its collective-bargaining agreement with petitioner Air Line Pilots Association, International (ALPA). An acrimonious strike ensued, during which Continental hired replacement pilots and reemployed several hundred crossover strikers. Two years into the strike, Continental announced in its "Supplementary Base Vacancy Bid 1985-5" (85-5 bid) that it would fill a large number of anticipated vacancies using a system that allows pilots to bid for positions and that, in the past, had assigned positions by seniority. Although ALPA authorized strikers to submit bids, Continental announced that all of the positions had been awarded to working pilots. ALPA and Continental then agreed to end the strike, dispose of some related litigation, and reallocate the positions covered by the 85-5 bid. Striking pilots were offered the option of settling all outstanding claims with Continental and participating in the 85-5 bid positions' allocations, electing not to return to work and receiving severance pay, or retaining their individual claims against Continental and becoming eligible to return to work only after all the settling pilots had been reinstated. Thus, striking pilots received some of the positions previously awarded to the working pilots. After the settlement, respondents, former striking pilots, filed suit in the District Court against ALPA, charging, inter alia, that the union had breached its duty of fair representation. The court granted ALPA's motion for summary judgment, but the Court of Appeals reversed. It rejected ALPA's argument that a union cannot breach the fair representation duty without intentional misconduct, applying, instead, the rule announced in Vaca v Sipes, 386 US 171, 17 L Ed 2d 842, 87 S Ct 903, that a union violates the duty if its actions are "arbitrary, discriminatory, or in bad faith," id., at 190, 17 L Ed 2d 842, 87 S Ct 903. With respect to the test's first component, the court found that a nonarbitrary decision must be (1) based upon relevant permissible union factors, (2) a rational result of the consideration of those factors, and (3) inclusive of a fair and impartial consideration of all employees' interests. Applying that test, the court concluded that a jury could find that ALPA acted arbitrarily by negotiating a settlement less favorable than the consequences of a complete surrender to Continental, which the court believed would have left intact the striking pilots' seniority rights with regard to the 85-5 bid positions. It also found the existence of a material issue of fact whether the favored treatment of working pilots in the allocation of the 85-5 bid positions constituted discrimination against the strikers.

Held:

1. The tripartite standard an-

nounced in Vaca v Sipes, supra, applies to a union in its negotiating capacity. See, e. g., Communications Workers v Beck, 487 US 735, 743, 101 L Ed 2d 634, 108 S Ct 2641. Thus, when acting in that capacity, the union is not, as ALPA contends, required only to act in good faith and treat its members equally and in a nondiscriminatory fashion. Rather, it also has a duty to act in a rational, nonarbitrary fashion to provide its members fair and adequate representation. See, e. g., Vaca v Sipes, supra, at 177, 17 L Ed 2d 842, 87 S Ct 903; Steele v Louisville & Nashville R. Co., 323 US 192, 202, 89 L Ed 173, 65 S Ct 226.

2. The final product of the bargaining process may constitute evidence of a breach of the fair representation duty only if, in light of the factual and legal landscape, it can be fairly characterized as so far outside of a "wide range of reasonableness," Ford Motor Co. v Huffman, 345 US 330, 338, 97 L Ed 1048, 73 S Ct 681, that it is wholly "irrational" or "arbitrary." The Court of Appeals' refinement of the arbitrariness component authorizes more judicial review of the substance of negotiated agreements than is consistent with national labor policy. Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. See, e. g., NLRB v Insurance Agents, 361 US 477, 488, 4 L Ed 2d 454, 80 S Ct 419. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. See Steele, supra, at 198, 89 L Ed 173, 65 S Ct 266. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. Cf., e. g., Day-Brite Lighting, Inc. v Missouri, 342 US 421, 423, 96 L Ed 469, 72 S Ct 405.

3. The resolution of the dispute as to the 85-5 bid positions was well within the "wide range of reasonableness" that a union is allowed in its bargaining. Assuming that the union made a bad settlement, it was by no means irrational when viewed in light of the legal landscape at the time of the settlement. Given Continental's resistance during the strike, it would have been rational for ALPA to recognize that a voluntary return to work might have precipitated litigation over the strikers' right to the positions, and that Continental might not have abandoned its bargaining position without a settlement disposing of the pilots' individual claims. Thus, it would have been rational to negotiate a settlement that produced certain and prompt access to a share of the new jobs, avoided the costs and risks associated with major litigation, and was more favorable than a return to work for the significant number of pilots who chose severance. Any discrimination between striking and working pilots in the allocation of the 85-5 bid positions does not represent a breach of the duty, because, if it is correct that ALPA's decision to accept a compromise was rational, some form of allocation was inevitable. Cf. Trans World Airlines, Inc. v Flight Attendants, 489 US 426, 103 L Ed 2d 456, 109 S Ct 1225; NLRB v Erie Resistor Corp. 373 US 221, 10 L Ed 2d 308, 83 S Ct 1139, 94 ALR2d 1147, distinguished.

886 F2d 1438, reversed.

Stevens, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Laurence Gold argued the cause for petitioner.
Marty Harper argued the cause for respondents.
Briefs of Counsel, p 745, infra.

OPINION OF THE COURT

[499 US 67]

Justice **Stevens** delivered the opinion of the Court.

[1a, 2a] We granted certiorari to clarify the standard that governs a claim that a union has breached its duty of fair representation in its negotiation of a back-to-work agreement terminating a strike. We hold that the rule announced in Vaca v Stipes, 386 US 171, 190, 17 L Ed 2d 842, 87 S Ct 903 (1967)—that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith"—applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness," Ford Motor Co. v Huffman, 345 US 330, 338, 97 L Ed 1048, 73 S Ct 681 (1953), as to be irrational.

[499 US 68]

I

This case arose out of a bitter confrontation between Continental Airlines, Inc. (Continental), and the union representing its pilots, the Air Line Pilots Association, International (ALPA). On September 24, 1983, Continental filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Immediately thereafter, with the approval of the Bankruptcy Court, Continental repudiated its collective-bargaining agreement with ALPA and unilaterally reduced its pilots' salaries and benefits by more than half. ALPA responded by calling a strike that lasted for over two years. See 886 F2d 1438, 1440 (CA5 1989).

Of the approximately 2,000 pilots employed by Continental, all but about 200 supported the strike. By the time the strike ended, about 400 strikers had "crossed over" and been accepted for reemployment in order of reapplication. App to Brief for Continental Airlines, Inc, as Amicus Curiae A11, and n 8. By trimming its operations and hiring about 1,000 replacements, Continental was able to continue in business. By August 1985, there were 1,600 working pilots and only 1,000 strikers. 886 F2d, at 1440.

The strike was acrimonious, punctuated by incidents of violence and the filing of a variety of law suits, charges, and countercharges. In August 1985, Continental notified ALPA that it was withdrawing recognition of ALPA as the collective-bargaining agent for its pilots. ALPA responded with a federal lawsuit alleging that Continental was unlawfully refusing to continue negotiations for a new collective bargaining agreement. In this adversary context, on September 9, 1985, Continental posted its "Supplementary Base Vacancy Bid 1985-5" (85-5 bid) —an act that precipitated not only an end to the strike, but also the litigation that is now before us. Ibid.

For many years Continental had used a "system bid" procedure for assigning pilots to new positions.

Bids were typically
[499 US 69]
posted well in advance in order to allow time for necessary training without interfering with current service. When a group of vacancies was posted, any pilot could submit a bid specifying his or her preferred position (captain, first officer, or second officer), base of operations, and aircraft type. Ibid. In the past, vacant positions had been awarded on the basis of seniority, determined by the date the pilot first flew for Continental. The 85-5 bid covered an unusually large number of anticipated vacancies—441 future captain and first officer positions and an undetermined number of second officer vacancies. Pilots were given nine days —until September 18, 1985—to submit their bids. Id., at 1441.

Fearing that this bid might effectively lock the striking pilots out of jobs the the indefinite future, ALPA authorized the strikers to submit bids. Several hundred did so, as did several hundred working pilots. Although Continental initially accepted bids from both groups, it soon became concerned about the bona fides of the striking pilots' offers to return to work at a future date. It therefore challenged the strikers' bids in court and announced that all of the 85-5 bid positions had been awarded to working pilots. Ibid.

At this juncture, ALPA intensified its negotiations for a complete settlement. ALPA's negotiating committee and Continental reached an agreement, which was entered as an order by the Bankruptcy Court on October 31, 1985. See App 7-41. The agreement provided for an end to the strike, the disposition of all pending litigation, and reallocation of the positions covered by the 85-5 bid. See id., at 10-34.

The agreement offered the striking pilots three options. Under the first, pilots who settled all outstanding claims with Continental were eligible to participate in the allocation of the 85-5 bid positions. Under the second option, pilots who elected not to return to work received severance pay of $4,000 per year of service (or $2,000 if they had been furloughed
[499 US 70]
before the strike began).[1] Under the third option, striking pilots retained their individual claims against Continental and were eligible to return to work only after all the first option pilots had been reinstated. See 886 F2d, at 1441-1442.

Pilots who chose the first option were thus entitled to some of the 85-5 bid positions that, according to Continental, had previously been awarded to working pilots. The first 100 captain positions were allocated to working pilots and the next 70 captain positions were awarded, in order of seniority, to returning strikers who chose option one. App 13. Thereafter, striking and nonstriking pilots were eligible for captain positions on a 1-to-1 ratio. Id., at 13-14. The initial base and aircraft type for a returning striker was assigned by Continental, but the assignments for working pilots were determined by their bids. 886 F2d, at 1441. After the initial assignment, future changes in bases and equipment were determined by seniority, and striking pilots who were in active service when the strike began re-

1. In its amicus curiae brief, Continental states that the 366 pilots who elected option 2 received $17.3 million, an average of over $47,000 per pilot. See Brief for Continental Airlines, Inc., as Amicus Curiae 9.

ceived seniority credit for the period of the strike. See App 22.

II

Several months after the settlement, respondents, as representatives of a class of former striking pilots, brought this action against ALPA. See App 1. In addition to raising other charges not before us, respondents alleged that the union had breached its duty of fair representation in negotiating and accepting the settlement.[2] After extensive discovery,

[499 US 71]

ALPA filed a motion for summary judgment. See id., at 3. Opposing that motion, respondents identified four alleged breaches of duty, including the claim that "ALPA negotiated an agreement that arbitrarily discriminated against striking pilots."[3]

The District Court granted the motion, relying alternatively on the fact that the Bankruptcy Court had approved the settlement and on its own finding that, even if the October 31 settlement was merely a private agreement, ALPA did not breach its duty of fair representation. In his oral explanation of his ruling, the District Judge opined that "the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike." App 75.

The Court of Appeals reversed. 886 F2d 1438 (CA5 1989). It first rejected ALPA's argument that a union cannot breach its duty of fair representation without intentional misconduct. The court held that the duty includes " 'three distinct' " components. Id., at 1444 (quoting Tedford v Peabody Coal Co., 533 F2d 952, 957, n 6 (CA5 1976)). A union breaches the duty of its conduct is " 'arbitrary, discriminatory, or in bad faith.' " 886 F2d, at 1444 (quoting Vaca v Sipes, 386 US, at 190, 17 L Ed 2d 842, 87 S Ct 903). With respect to the arbitrariness

[499 US 72]

component, the Court of Appeals followed Fifth Circuit precedent, stating:

" 'We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration of these factors;* and (3) inclusive of a fair and

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2. The complaint included four counts: breach of the duty of fair representation, violation of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USC § 411 et seq. [29 USCS §§ 411 et seq.], breach of fiduciary duty in violation of the LMRDA, and breach of contract. See App 47-56. The District Court granted summary judgment for petitioners on all counts, id., at 72-77, but respondents appealed only on the first two counts, see 886 F2d 1438, 1442 (CA5 1989). The Court of Appeals affirmed the summary judgment on the LMRDA count, id., at 1448, and respondents did not seek our review of this decision. Therefore, only the fair representation claim is before us.

3. The Court of Appeals described respondents' claims as follows:

"The O'Neill Group asserted that the duty of fair representation had been breached by ALPA and various ALPA officers because (1) ALPA failed to allow ratification of the agreement and misrepresented the facts surrounding the negotiations to avoid a ratification vote; (2) ALPA negotiated an agreement that arbitrarily discriminated against striking pilots, including the O'Neill Group; (3) ALPA and various ALPA officers misrepresented to retired and resigned pilots that they would be included in any settlement; and (4) defendants were compelled by motives of personal gain, namely self-interest and political motivations." Id., at 1442.

impartial consideration of the interests of all employees.'" 886 F2d, at 1444 (quoting Tedford, 533 F2d, at 957) (footnotes omitted and emphasis added by the Court of Appeals).

Applying this arbitrariness test to the facts of this case, the Court of Appeals concluded that a jury could find that ALPA acted arbitrarily because the jury could find that the settlement "left the striking pilots worse off in a number of respects than complete surrender to [Continental]." 886 F2d, at 1445. That conclusion rested on the court's opinion that the evidence suggested that, if ALPA had simply surrendered and made an unconditional offer to return to work, the strikers would have been entitled to complete priority on all the positions covered by the 85-5 bid.[4] Relying on a District Court decision in litigation between ALPA and another airline,[5] the court rejected ALPA's argument that the 85-5 bid positions were arguably not vacancies because they had already been assigned to working pilots. Id., at 1446. In addition, the Court of Appeals ruled that the evidence raised

[499 US 73]

a genuine issue of material fact whether the favored treatment of working pilots in the allocation of 85-5 bid positions constituted discrimination against those pilots who had chosen to strike. Id., at 1446-1447.

The court held that respondents had raised a jury question whether ALPA had violated its duty to refrain from "arbitrary" conduct, and the court therefore remanded the case for trial. Id., at 1448-1449. Because it reversed the District Court's grant of summary judgment on the arbitrariness component, the Court of Appeals did not decide whether summary judgment on the fair representation claim might be precluded by the existence of other issues of fact.[6]

We granted certiorari to review the Court of Appeals' statement of the standard governing an alleged breach of a union's duty of fair representation and the court's application of the standard in this case. 498 US 806, 112 L Ed 2d 14, 111 S Ct 37 (1990).

III

ALPA's central argument is that the duty of fair representation requires only that a union act in good faith and treat its members equally and in a nondiscriminatory fashion. The duty, the union argues, does not impose any obligation to provide *adequate* representation. The District Court found that there was no evidence that ALPA acted other than in good faith and without discrimi-

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4. "Accepting the pilots' evidence as true as we are required to do, a jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, [Continental] likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to [Continental]'s seniority-based assignment procedures." Id., at 1446.

5. Air Line Pilots Assn. Int'l v United Air Lines, Inc. 614 F Supp 1020 (ND Ill 1985), aff'd in relevant part, Air Line Pilots Assn. Int'l v United Air Lines, Inc. 802 F2d 886 (CA7 1986), cert denied, 480 US 946, 94 L Ed 2d 791, 107 S Ct 1605 (1987).

6. Respondents also argued that a jury could find that ALPA acted in bad faith. See n 3, supra. Although we conclude below that the Court of Appeals erred in reversing summary judgment on the arbitrariness component, see Part IV, infra, we express no opinion on whether respondents have put forth a triable issue concerning whether ALPA acted in bad faith.

nation.[7] Because of its view of the limited scope of the duty, ALPA contends that the District

[499 US 74]

Court's finding, which the Court of Appeals did not question, is sufficient to support summary judgment.

[3a] The union maintains, not without some merit, that its view that courts are not authorized to review the rationality of good-faith, nondiscriminatory union decisions is consonant with federal labor policy. The Government has generally regulated only "the *process* of collective bargaining," H. K. Porter Co. v NLRB, 397 US 99, 102, 25 L Ed 2d 146, 90 S Ct 821 (1970) (emphasis added), but relied on private negotiation between the parties to establish "their own charter for the ordering of industrial relations," Teamsters v Oliver, 358 US 283, 295, 3 L Ed 2d 312, 79 S Ct 297 (1959). As we stated in NLRB v Insurance Agents, 361 US 477, 488, 4 L Ed 2d 454, 80 S Ct 419 (1960), Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." See also Carbon Fuel Co. v Mine Workers, 444 US 212, 219, 62 L Ed 2d 394, 100 S Ct 410 (1979).

[4] There is, however, a critical difference between governmental modification of the terms of a private agreement and an examination of those terms in search for evidence that a union did not fairly and adequately represent its constituency. Our decisions have long recognized that the need for such an examination proceeds directly from the union's statutory role as exclusive bargaining agent. "[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." Steele v Louisville & Nashville R. Co. 323 US 192, 202, 89 L Ed 173, 65 S Ct 226 (1944).

[5] The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. For example, some Members of the Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries. See Teamsters v Terry, 494 US 558, 567-568, 108 L Ed 2d 519, 110 S Ct 1339 (1990); id., at 584-588, 108 L Ed 2d 519, 110 S Ct 1339 (Kennedy, J., dissenting). Others have likened the relationship between union and employee to that between attorney and client.

[499 US 75]

See id., at 582, 108 L Ed 2d 519, 110 S Ct 1339 (Stevens, J., concurring in part and concurring in judgment). The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders. Just as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith. See, e.g., Restatement (Second) of Trusts § 174 (1959) (trustee's duty of care); Strickland v Washington, 466 US 668, 686, 80 L Ed 2d 674, 104 S Ct 2052 (1984) (lawyer must render "adequate legal assistance"); Hanson Trust PLC v ML SCM Acquisition Inc. 781 F2d

7. "There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation." App 74.

264, 274 (CA2 1986) (directors owe duty of care as well as loyalty).

ALPA suggests that a union need owe no enforceable duty of adequate representation because employees are protected from inadequate representation by the union political process. ALPA argues, as has the Seventh Circuit, that employees "do not need . . . protection against representation that is inept but not invidious" because if a "union does an incompetent job . . . its members can vote in new officers who will do a better job or they can vote in another union." Dober v Roadway Express, Inc. 707 F2d 292, 295 (CA7 1983). In Steele, the case in which we first recognized the duty of fair representation, we also analogized a union's role to that of a legislature. See 323 US, at 198, 89 L Ed 173, 65 S Ct 226. Even legislatures, however, are subject to *some* judicial review of the rationality of their actions. See, e.g., United States v Carolene Products Co. 304 US 144, 82 L Ed 1234, 58 S Ct 778 (1938); Department of Agriculture v Moreno, 413 US 528, 37 L Ed 2d 782, 93 S Ct 2821 (1973).

[6] ALPA relies heavily on language in Ford Motor Co. v Huffman, 345 US 330, 97 L Ed 1048, 73 S Ct 681 (1953), which, according to the union, suggests that no review of the substantive terms of a settlement between labor and management is permissible. In particular, ALPA stresses our comment in the case that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of

[499 US 76]

purpose in the exercise of its discretion." Id., at 338, 97 L Ed 1048, 73 S Ct 681. Unlike ALPA, we do not read this passage to limit review of a union's actions to "good faith and honesty of purpose," but rather to recognize that a union's conduct must also be within "[a] wide range of reasonableness."

Although there is admittedly some variation in the way in which our opinions have described the unions' duty of fair representation, we have repeatedly identified three components of the duty, including a prohibition against "arbitrary" conduct. Writing for the Court in the leading case in this area of the law, Justice White explained:

> "The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v Louisville & N.R. Co. 323 US 192 [89 L Ed 173, 65 S Ct 226]; Tunstall v Brotherhood of Locomotive Firemen, 323 US 210 [89 L Ed 187, 65 S Ct 235], and was soon extended to unions certified under the N.L.R.A., see Ford Motor Co. v Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v Moore, 375 US, at 342 [11 L Ed 2d 370, 84 S Ct 363]. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of ac-

tion." Vaca v Sipes, 386 US, at 177, 17 L Ed 2d 842, 87 S Ct 903.

This description of the "duty grounded in federal statutes" has been accepted without question by Congress and in a line of our decisions spanning almost a quarter of a century.[8]

[499 US 77]

[1b] The union correctly points out, however, that virtually all of those cases can be distinguished because they involved contract administration or enforcement rather than contract negotiation. ALPA argues that the policy against substantive review of contract terms applies directly only in the negotiation area. Although this is a possible basis for distinction, none of our opinions has suggested that the duty is governed by a double standard. Indeed, we have repeatedly noted that the Vaca v Sipes standard applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." Communications Workers v Beck, 487 US 735, 743, 101 L Ed 2d 634, 108 S Ct 2641 (1988) (internal citation omitted); see also Electrical Workers v Foust, 442 US 42, 47, 60 L Ed 2d 698, 99 S Ct 2121 (1979); Vaca v Sipes, 386 US, at 177, 17 L Ed 2d 842, 87 S Ct 903. We have also held that the duty applies in other instances in which a union is acting in its representative role, such as when the union operates a hiring hall. See Breininger v Sheet Metal Workers, 493 US 67, 87-89, 107 L Ed 2d 388, 110 S Ct 424 (1989).

We doubt, moreover, that a bright line could be drawn between contract administration and contract negotiation. Industrial grievances may precipitate settlement negotiations leading to contract amendments, and some strikes and strike settlement agreements may focus entirely on questions of contract interpretation. See Conley v Gibson, 355 US 41, 46, 2 L Ed 2d 80, 78 S Ct 99 (1957); Steelworkers v Warrior & Gulf Navigation Co. 363 US 574, 581, 4 L Ed 2d 1409, 80 S Ct 1347 (1960). Finally, some union activities subject to the duty of fair representation fall into neither category. See Breininger, 493 US, at 87-89, 107 L Ed 2d 388, 110 S Ct 424.

[1c, 2b] We are, therefore, satisfied that the Court of Appeals correctly concluded that the tripartite standard announced in Vaca v Sipes applies to a union in its negotiating capacity. We are persuaded, however, that the Court of Appeals' further refinement of the arbitrariness component of the standard authorizes more judicial review of the substance of negotiated agreements than is consistent with national labor policy.

[499 US 78]

[3b] As we acknowledged above, Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bar-

8. See, e. g., Teamsters v Terry, 494 US 558, 563, 108 L Ed 2d 519, 110 S Ct 1339 (1990); Electrical Workers v Foust, 442 US 42, 47, 60 L Ed 2d 698, 99 S Ct 2121 (1979); Hines v Anchor Motor Freight, Inc. 424 US 554, 564, 47 L Ed 2d 231, 96 S Ct 1048 (1976).

gaining responsibilities. Cf. Day-Brite Lighting, Inc. v Missouri, 342 US 421, 423, 96 L Ed 469, 72 S Ct 405 (1952) (court does "not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare"); United States v Carolene Products, 304 US, at 154, 82 L Ed 1234, 58 S Ct 778 (where "question is at least debatable," "decision was for Congress"). For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," Ford Motor Co. v Huffman, 345 US, at 338, 97 L Ed 1048, 73 S Ct 681, that it is wholly "irrational" or "arbitrary."

[7a] The approach of the Court of Appeals is particularly flawed because it fails to take into account either the strong policy favoring the peaceful settlement of labor disputes, see, e.g., Groves v Ring Screw Works, Ferndale Fastener Div. 498 US 168, 174, 112 L Ed 2d 508, 111 S Ct 498 (1990), or the importance of evaluating the rationality of a union's decision in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made. As we shall explain, these factors convince us that ALPA's agreement to settle the strike was not arbitrary for either of the reasons posited by the Court of Appeals.

IV

The Court of Appeals placed great stress on the fact that the deal struck by ALPA was worse than the result the union would have obtained by unilateral termination of the strike. Indeed, the court held that a jury finding that the settlement

[499 US 79]

was worse than surrender could alone support a judgment that the union had acted arbitrarily and irrationally. See 886 F2d, at 1445-1446. This holding unduly constrains the "wide range of reasonableness," 345 US, at 338, 97 L Ed 1048, 73 S Ct 681, within which unions may act without breaching their fair representation duty.

For purposes of decision, we may assume that the Court of Appeals was correct in its conclusion that, if ALPA had simply surrendered and voluntarily terminated the strike, the striking pilots would have been entitled to reemployment in the order of seniority. Moreover, we may assume that Continental would have responded to such action by rescinding its assignment of all of the 85-5 bid positions to working pilots. After all, it did rescind about half of those assignments pursuant to the terms of the settlement. Thus, we assume that the union made a bad settlement—one that was even worse than a unilateral termination of the strike.

Nevertheless, the settlement was by no means irrational. A settlement is not irrational simply because it turns out *in retrospect* to have been a bad settlement. Viewed in light of the legal landscape at the time of the settlement, ALPA's decision to settle rather than give up was certainly not illogical. At the time of the settlement, Continental had notified the union that all of the 85-5 bid positions had been awarded to working pilots and was maintaining that none of the strikers had any claim on any of those jobs.

[7b, 8a] A comparable position had been asserted by United Air Lines in litigation in the Northern District of

Illinois.[9] Because the District Court in that case had decided that such vacancies were not filled until pilots were trained and actually working in their new assignments, the Court of Appeals here concluded that the issue had been resolved in ALPA's favor when it agreed to the settlement with Continental. See 886 F2d, at 1446. But this reasoning overlooks the fact

[499 US 80]

that the validity of the District Court's ruling in the other case was then being challenged on appeal.[10]

[7c, 9] Moreover, even if the law had been clear that the 85-5 bid positions were vacancies, the Court of Appeals erroneously assumed that the existing law was also clarion that the striking pilots had a right to those vacancies because they had more seniority than the crossover and replacement workers. The court relied for the latter proposition solely on our cases interpreting the National Labor Relations Act. See 886 F2d, at 1445. We have made clear, however, that National Labor Relations Act cases are not necessarily controlling in situations, such as this one, which are governed by the Railway Labor Act. See Trainmen v Jacksonville Terminal Co. 394 US 369, 383, 22 L Ed 2d 344, 89 S Ct 1109 (1969).

[7d] Given the background of determined resistance by Continental at all stages of this strike, it would certainly have been rational for ALPA to recognize the possibility that an attempted voluntary return to work would merely precipitate litigation over the right to the 85-5 bid positions. Because such a return would not have disposed of any of the individual claims of the pilots who ultimately elected option one or option two of the settlement, there was certainly a realistic possibility that Continental would not abandon its bargaining position without a complete settlement.

[499 US 81]

At the very least, the settlement produced certain and prompt access to a share of the new jobs and avoided the costs and risks associated with major litigation. Moreover, since almost a third of the striking pilots chose the lump-sum severance payment rather than reinstatement, see n 1, supra, the settlement was presumably more advantageous than a surrender to a significant number of striking pilots. In labor disputes, as in other kinds of litigation, even a bad settlement may be more advantageous in the long run than a good lawsuit. In all events, the resolution of the dispute over the 85-5 bid vacancies was well within the "wide range of reasonableness," 345 US, at 338, 97 L Ed 1048, 73 S Ct 681, that a union is allowed in its bargaining.

[10] The suggestion that the "dis-

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9. Air Line Pilots Assn. Int'l v United Air Lines, Inc. 614 F Supp 1020 (ND Ill 1985).

10. **[8b]** Even if the Seventh Circuit had already affirmed the District Court's holding in the United Air Lines case, the Court of Appeals would have erred in its conclusion that the law was so assuredly in ALPA's favor that the settlement was irrational. First, a Seventh Circuit case would not have controlled the outcome in this dispute, which arose in the Fifth Circuit. Second, even if the United Air Lines decision had been a Fifth Circuit case, it was factually distinguishable and therefore might not have dictated the outcome regarding the 85-5 bid positions. In United Air Lines, the Seventh Circuit affirmed on the basis of the District Court's finding that the carrier's action was taken in bad faith, motivated by antiunion animus. 802 F2d, at 898; 614 F Supp, at 1046. An equivalent finding was by no means certain in this case.

crimination" between striking and working pilots represented a breach of the duty of fair representation also fails. If we are correct in our conclusion that it was rational for ALPA to accept a compromise between the claims of the two groups of pilots to the 85-5 bid positions, some form of allocation was inevitable. A rational compromise on the initial allocation of the positions was not indivious "discrimination" of the kind prohibited by the duty of fair representation. Unlike the grant of "super-seniority" to the crossover and replacement workers in NLRB v Erie Resistor Corp. 373 US 221, 10 L Ed 2d 308, 83 S Ct 1139, 94 ALR2d 1147 (1963), this agreement preserved the seniority of the striking pilots after their initial reinstatement. In Erie, the grant of extra seniority enabled the replacement workers to keep their jobs while more senior strikers lost theirs during a layoff subsequent to the strike. See id., at 223-224, 10 L Ed 2d 308, 83 S Ct 1139, 94 ALR2d 1147. The agreement here only provided the order and mechanism for the reintegration of the returning strikers but did not permanently alter the seniority system. This case therefore more closely resembles our decision in Trans World Airlines, Inc. v Flight Attendants, 489 US 426, 103 L Ed 2d 456, 109 S Ct 1225 (1989), in which we held that an airline's refusal, after a strike, to displace crossover workers with more senior strikers was not unlawful discrimination.

[499 US 82]

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[499 US 83]

WEST VIRGINIA UNIVERSITY HOSPITALS, INC., Petitioner

v

ROBERT CASEY, Governor of Pennsylvania, et al.

499 US 83, 113 L Ed 2d 68, 111 S Ct 1138

[No. 89-994]

Argued October 9, 1990. Decided March 19, 1991.

Decision: Fees for services rendered by experts in civil rights litigation held not properly shifted to losing party under 42 USCS § 1988.

SUMMARY

A corporation which operated a hospital in West Virginia near the Pennsylvania border unsuccessfully objected to new medicaid reimbursement schedules proposed by Pennsylvania's Department of Public Welfare for services provided by the hospital to Pennsylvania residents. After exhausting administrative remedies, the corporation filed suit under 42 USCS § 1983 in the United States District Court for the Middle District of Pennsylvania, naming the Governor of Pennsylvania and various other state officials as defendants and alleging that the proposed reimbursement schedules violated federal constitutional and statutory law. Counsel for the corporation employed an accounting firm and three doctors specializing in hospital finance to assist in the preparation of the suit and to testify at trial. The District Court ruled in favor of the corporation and awarded the corporation attorneys' fees under 42 USCS § 1988 in the amount of $500,000, including $104,133 attributable to expert services. The United States Court of Appeals for the Third Circuit affirmed in part on the merits, but vacated the District Court's judgment with regard to attorneys' fees insofar as it granted expert witness fees in excess of the $30 per day then authorized by 28 USCS §§ 1821(b) (later amended) and 1920 (885 F2d 11).

On certiorari, the United States Supreme Court affirmed. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and WHITE, O'CONNOR, KENNEDY, and SOUTER, JJ., it was held that (1) while experts appearing at trial are eligible for the witness fees provided by §§ 1821(b) and 1920, absent explicit statutory authority to the contrary (a) such reimbursement is subject to the dollar limit set by § 1821(b), and (b) § 1920 does not authorize fees for

Briefs of Counsel, p 746, infra.

services rendered by an expert employed by a party in a nontestimonial advisory capacity; and (2) § 1988 conveys no such authority to shift fees for services rendered by experts in civil rights litigation to the losing party, as (a) the record of statutory usage demonstrates that attorneys' fees and expert fees are regarded as separate elements of litigation cost, (b) the case law prior to the 1976 enactment of the attorneys' fees provision of § 1988 similarly indicates that attorneys' fees and expert fees were regarded as distinct categories of litigation expense, and (c) neither Congress' supposed intent to provide a full and complete judicial remedy by enacting the attorneys' fees provision of § 1988, nor the assertion that Congress may have simply forgotten to expressly include expert fees as it had done in similar statutes, can control over the unambiguous language of § 1988.

MARSHALL, J., dissented, expressing the view that (1) the court's literal interpretation of § 1988 did not minister to congressional intent, and (2) this was a dangerous usurpation of congressional power, particularly since § 1988 was designed to give access to the federal courts to persons and groups attempting to vindicate vital civil rights.

STEVENS, J., joined by MARSHALL and BLACKMUN, JJ., dissented, expressing the view that the omission of express authorization for expert witness fees in § 1988 should not preclude the award of such fees, because (1) the phrase "reasonable attorney's fee" has been interpreted as referring to a reasonable fee for the work product of attorneys, including the work of nonattorneys who perform important tasks which save the attorneys' time and enhance the quality of their work product; (2) to cover charges for paralegals and law clerks under this reasoning while not including expert witness fees would be arbitrary and contrary to the broad remedial purpose of § 1988, which was intended to make the prevailing party whole and encourage public interest litigation; and (3) on those occasions when the Supreme Court has taken a purely literal approach to statutory interpretation, ignoring the available evidence of congressional purpose and the teaching of prior cases interpreting a statute, its conclusions have commonly been repudiated by subsequent Congresses.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

15 Am Jur 2d, Civil Rights § 278; 20 Am Jur 2d, Costs §§ 53, 65; 81 Am Jur 2d, Witnesses §§ 23, 25

6 Federal Procedure, L Ed, Civil Rights §§ 11:144, 11:145; 21 Federal Procedure, L Ed, Judgments and Orders § 51:95; 33 Federal Procedure, L Ed, Witnesses §§ 80:206-80:208

5 Federal Procedural Forms, L Ed, Civil Rights §§ 10:685-10:689

7A Am Jur Pl & Pr Forms (Rev), Costs, Form 106

2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses

28 USCS §§ 1821(b), 1920; 42 USCS § 1988

L Ed Digest, Civil Rights § 79; Costs and Fees § 32

L Ed Index, Attorneys' Fees; Civil Rights and Discrimination; Costs of Actions; Expert and Opinion Evidence; Witnesses

Index to Annotations, Attorneys' Fees; Civil Rights Attorney's Fees Awards Act; Compensation; Costs and Expenses; Witnesses

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to awards of attorneys' fees in federal civil rights cases. 87 L Ed 2d 713.

Supreme Court's views as to requisites for award of attorneys' fees. 77 L Ed 2d 1540.

Supreme Court's views on weight to be accorded to pronouncements of legislature, or members of legislature, respecting meaning or intent of previously enacted statute. 56 L Ed 2d 918.

Compensation of expert witness as costs recoverable in federal civil action by prevailing party against party other than United States. 71 ALR Fed 875.

Construction and application of Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USCS § 1988), providing that court may allow prevailing party, other than United States, reasonable attorney's fee in certain civil rights actions. 43 ALR Fed 243.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights § 79; Costs and Fees § 32; Statutes §§ 102, 103, 123.5, 134; Witnesses § 105 — attorneys' fees — expert testimony and assistance

1a-1i. The attorneys' fees provision of 42 USCS § 1988—which provision permits the courts to allow the prevailing parties, in actions to enforce certain federal civil rights statutes, "a reasonable attorney's fee as part of the costs"—conveys no authority to shift fees for services rendered by experts in civil rights litigation to the losing party, since (1) the record of statutory usage demonstrates that attorneys' fees and expert fees are regarded as separate elements of litigation cost, with fees for expert witnesses and, less common, nontestimonial expert services being referred to in addition to attorneys' fees when a shift is intended, (2) the case law prior to the 1976 enactment of the attorneys' fees provision of § 1988 similarly indicates that attorneys' fees and expert fees were regarded as distinct categories of litigation expense, with expert fees sometimes being shifted to the losing parties under various equitable doctrines, but not as an element of attorneys' fees, and with the overwhelming majority of cases interpreting other fee-shifting statutes not treating the phrase "attorney's fees" as including fees for expert services, (3) the attorneys' fees provision of § 1988 was not intended precisely to restore the law prior to the decision in Alyeska Pipeline Service Co. v Wilderness Soc. (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612, which law often allowed expert fee awards on an equitable basis, so the objective of achieving such a restoration was no reason to depart from the normal import of § 1988's text, and (4) neither Congress' supposed intent to provide a full and complete judicial remedy by enacting the attorneys' fees provision of § 1988, nor the assertion that Congress may have simply forgotten to expressly include expert fees as it had done in similar statutes, can control over the unambiguous language of § 1988; while experts appearing at trial are eligible for the witness fee provided by 28 USCS §§ 1821(b) and 1920, absent explicit statutory authority to the contrary—which § 1988 does not provide—(1) such reimbursement is subject to the dollar limit set by § 1821(b), and (2) § 1920 does not authorize fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity. (Marshall, Stevens, and Blackmun, JJ., dissented from this holding.)

Costs and Fees § 32; Statutes § 236; Witnesses § 105 — award of witness fees — implied repeal

2. It will not be lightly inferred that Congress has repealed 28 USCS §§ 1821 and 1920—which respectively (1) set per-day dollar limits on witness attendance fees, and (2) allow such fees and various other expenses to be taxed as costs—either through Rule 54(d) of the Federal Rules of Civil Procedure or any other provision not referring explicitly to witness fees.

Costs and Fees § 32; Witnesses § 105 — expert fees — witness fee limits

3. The per-day dollar limits for fees set by 28 USCS § 1821(b) apply only to witnesses in attendance at trial, and are of no consequence with

regard to expert fees incurred by a party to a case where those fees are unrelated to expert testimony.

Civil Rights § 79 — attorneys' fees — private attorney general doctrine

4. Unlike the previously applied private attorney general doctrine, the attorneys' fees provision of 42 USCS § 1988 does not limit civil rights plaintiffs to recovering such fees only if (1) private enforcement is necessary to defend important rights benefiting large numbers of people, and (2) cost barriers might otherwise preclude private suits; thus, in a lawsuit by a corporation operating a hospital in one state, which lawsuit successfully sought to invalidate on federal statutory and constitutional grounds a neighboring state's new medicaid reimbursement schedules for services provided by the hospital to residents of the latter state, there is no question as to the propriety of shifting the corporation's attorneys' fees to the defendant state officials under § 1988, even though it is highly doubtful that such fees could have been awarded under previous equitable theories.

Statutes §§ 83, 100, 146, 147 — purpose — statements of legislators and committees — unambiguous text

5. The purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone; the best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President, and where that text contains a phrase which is unambiguous—that is, which has a clearly accepted meaning in both legislative and judicial practice—that phrase may not be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

Courts § 92.7; Statutes §§ 82, 129 — considering other statutes — avoiding undesirable consequences

6. Where a statutory term presented to the courts for the first time is ambiguous, the courts construe that term to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law—not because that precise accommodative meaning is what the lawmakers must have had in mind, but because it is the courts' role to make sense rather than nonsense out of the body of the law; but where the meaning of the statutory term prevents such accommodation, it is not the courts' function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently; where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot to include something than for saying that the earlier Congress felt differently; in such circumstances, the attribution of forgetfulness rests on the judge's assessment that the later statute contains the better disposition, which is not for judges to prescribe; to supply omissions transcends the judicial function.

Courts § 92.5; Statutes §§ 91, 153 — legislative intent — subsequent amendment — judicial interpretation

7a, 7b. A court's interpretation of

a statute is not proved wrong if Congress subsequently amends the statute to conform to a differing interpretation; the will of Congress to which the courts look in interpreting a statute is not a will evolving from session to session, but a will expressed and fixed in a particular enactment; the role of the courts is to say what the law, as hitherto enacted, is, not to forecast what the law, as amended, will be.

SYLLABUS BY REPORTER OF DECISIONS

After petitioner West Virginia University Hospitals, Inc. (WVUH), prevailed at trial in its suit under 42 USC § 1983 [42 USCS § 1983] against respondent Pennsylvania officials over Medicaid reimbursement rates for services provided to Pennsylvania residents, the District Court awarded fees pursuant to § 1988, which, inter alia, gives the court in certain civil rights suits discretion to allow the prevailing party "a reasonable attorney's fee as part of the costs." WVUH's award included fees attributable to an accounting firm and three doctors specializing in hospital finance hired to assist in the preparation of the suit and to testify. The Court of Appeals affirmed as to the merits, but reversed as to the expert fees, disallowing them except to the extent that they fell within the $30-per-day fees for witnesses provided by 28 USC §§ 1920(3) and 1821(b) [28 USCS §§ 1920(3) and 1821(b)].

Held: Fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of "a reasonable attorney's fee" under § 1988.

(a) Sections 1920 and 1821(b) define the full extent of a federal court's power to shift expert fees, whether testimonial or nontestimonial, absent "explicity statutory authority to the contrary." Crawford Fitting Co. v J. T. Gibbons, Inc., 482 US 437, 439, 96 L Ed 2d 385, 107 S Ct 2494; see id., at 441, 96 L Ed 2d 385, 107 S Ct 2494. This Court will not lightly infer that Congress has repealed those sections through a provision like § 1988 that does not refer explicitly to witness fees. See id., at 445, 96 L Ed 2d 385, 107 S Ct 2494.

(b) Statutory usage before, during, and after 1976 (the date of § 1988's enactment) did not regard the phrase "attorney's fees" as embracing fees for experts' services.

(c) At the time of § 1988's enactment, judicial usage did not regard the phrase "attorney's fees" as including experts' fees.

(d) Where, as here, a statute contains a phrase that is unambiguous, this Court's sole function is to enforce it according to its terms. See, e. g., United States v Ron Pair Enterprises, Inc., 489 US 235, 241, 103 L Ed 2d 290, 109 S Ct 1026. Although chronology and the remarks of some sponsors of the bill that became § 1988 suggest that it was viewed as a response to Alyeska Pipeline Service Co. v Wilderness Society, 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612 (1975), the text of § 1988 is both broader and narrower than the pre-Alyeska regime. The best evidence of congressional purpose is the statutory text, which cannot be expanded or contracted by the statements of individual legislators or committees during the enactment process. WVUH's argument that Congress would have included expert fees in § 1988 if it had thought about it, as it did in the Equal Access to Justice Act, and that

this Court has a duty to ask how Congress would have decided had it actually considered the question, profoundly mistakes the Court's role with respect to unambiguous statutory terms. See Iselin v United States, 270 US 245, 250-251, 70 L Ed 566, 46 S Ct 248.

885 F2d 11, affirmed.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, Kennedy, and Souter, JJ., joined. Marshall, J., filed a dissenting opinion. Stevens, J., filed a dissenting opinon, in which Marshall and Blackmun, JJ., joined.

APPEARANCES OF COUNSEL

Robert T. Adams argued the cause for petitioner.

Calvin R. Koons argued the cause for respondents.

Briefs of Counsel, p 746, infra.

OPINION OF THE COURT

[499 US 84]

Justice **Scalia** delivered the opinion of the Court.

[1a] This case presents the question whether fees for services rendered by experts in civil rights litigation may be shifted to the losing party pursuant to 42 USC § 1988 [42 USCS § 1988], which permits the award of "a reasonable attorney's fee."

[499 US 85]

I

Petitioner West Virginia University Hospitals, Inc. (WVUH), operates a hospital in Morgantown, W. Va., near the Pennsylvania border. The hospital is often used by Medicaid recipients living in southwestern Pennsylvania. In January 1986, Pennsylvania's Department of Public Welfare notified WVUH of new Medicaid reimbursement schedules for services provided to Pennsylvania residents by the Morgantown hospital. In administrative proceedings, WVUH unsuccessfully objected to the new reimbursement rates on both federal statutory and federal constitutional grounds. After exhausting administrative remedies, WVUH filed suit in Federal District Court under 42 USC § 1983 [42 USCS § 1983]. Named as defendants (respondents here) were Pennsylvania Governor Robert Casey and various other Pennsylvania officials.

Counsel for WVUH employed Coopers & Lybrand, a national accounting firm, and three doctors specializing in hospital finance to assist in the preparation of the lawsuit and to testify at trial. WVUH prevailed at trial in May 1988. The District Court subsequently awarded fees pursuant to 42 USC § 1988 [42 USCS § 1988],[1] including over $100,000 in fees attributable to expert services. The District Court found these services to have been "essential" to presentation of the case—a finding not disputed by respondents.

Respondents appealed both the judgment on the merits and the fee award. The Court of Appeals for the Third Circuit affirmed as to the former, but reversed as to the expert

1. Title 42 USC § 1988 [42 USCS § 1988] provides in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

fees, disallowing them except to the extent that they fell within the $30-per-day fees for witnesses prescribed by 28 USC § 1821 [28 USCS § 1821]. 885 F2d 11 (1989). WVUH petitioned

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this Court for review of that disallowance; we granted certiorari, 494 US 1003, 108 L Ed 2d 472, 110 S Ct 1294 (1990).

II

[2] Title 28 USC § 1920 [28 USCS § 1920] provides:

> "A judge or clerk of any court of the United States may tax as costs the following:
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> "(1) Fees of the clerk and marshal;
>
> "(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> "(3) Fees and disbursements for printing and witnesses;
>
> "(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> "(5) Docket fees under section 1923 of this title;
>
> "(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."

Title 28 USC § 1821(b) [28 USCS § 1821(b)] limits the witness fees authorized by § 1920(3) as follows: "A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance. . . ."[2] In Crawford Fitting Co. v J.T. Gibbons, Inc. 482 US 437, 96 L Ed 2d 385, 107 S Ct 2494 (1987), we held that these provisions define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further. "[W]hen," we said, "a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of § 1821(b), absent contract or explicit statutory authority to the contrary." Id., at 439, 96 L Ed 2d 385, 107 S Ct 2494. "We will

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not lightly infer that Congress has repealed §§ 1920 and 1821, either through [Federal Rule of Civil Procedure] 54(d) or any other provision not referring explicitly to witness fees." Id., at 445, 96 L Ed 2d 385, 107 S Ct 2494.

[1b, 3] As to the testimonial services of the hospital's experts, therefore, Crawford Fitting plainly requires, as a prerequisite to reimbursement, the identification of "explicit statutory authority." WVUH argues, however, that some of the expert fees it incurred in this case were unrelated to expert *testimony,* and that as to those fees the § 1821(b) limits, which apply only to witnesses in attendance at trial, are of no consequence. We agree with that, but there remains applicable the limitation of § 1920. Crawford Fitting said that we would not lightly find an implied repeal of § 1821 *or* of § 1920, which it held to be an express limitation upon the types of costs which, absent other authority,

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2. Section 1821(b) has since been amended to increase the allowable per diem from $30 to $40. See Judicial Improvements Act of 1990, Pub L 101-650, § 314.

may be shifted by federal courts. 482 US, at 441, 96 L Ed 2d 385, 107 S Ct 2494. None of the categories of expenses listed in § 1920 can reasonably be read to include fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity. The question before us, then, is—with regard to both testimonial and nontestimonial expert fees—whether the term "attorney's fee" in § 1988 provides the "explicit statutory authority" required by Crawford Fitting.[3]

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III

[1c] The record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost. While some fee-shifting provisions, like § 1988, refer only to "attorney's fees," see, e.g., Civil Rights Act of 1964, 42 USC § 2000e-5(k) [42 USCS § 2000e-5(k)], many others explicitly shift expert witness fees *as well as* attorney's fees. In 1976, just over a week prior to the enactment of § 1988, Congress passed those provisions of the Toxic Substances Control Act, 15 USC §§ 2618(d), 2619(c)(2) [15 USCS §§ 2618(d), 2619(c)(2)], which provide that a prevailing party may recover "the costs of suit and reasonable fees for attorneys *and expert witnesses.*" (Emphasis added.) Also in 1976, Congress amended the Consumer Product Safety Act, 15 USC §§ 2060(c), 2072(a), 2073 [15 USCS §§ 2060(c), 2072(a), 2073], which as originally enacted in 1972 shifted to the losing party "cost[s] of suit, including a reasonable attorney's fee," see 86 Stat 1226. In the 1976 amendment, Congress altered the fee-shifting provisions to their present form by adding a phrase shifting expert witness fees *in addition to* attorney's fees. See Pub L 94-284, § 10, 90 Stat 506, 507. Two other significant Acts passed in 1976 contain similar phrasing: the Resource Conservation and Recovery Act of 1976, 42 USC § 6972(e) [42 USCS § 6972(e)] ("costs of litigation (including reasonable attorney and expert witness fees)"), and the Natural Gas Pipeline Safety Act Amendments of 1976, 49 USC App § 1686(e) [49 USCS Appx § 1686(e)] ("costs of suit, including reasonable attorney's fees and reasonable expert witnesses fees").

Congress enacted similarly phrased fee-shifting provisions in numerous statutes both before 1976, see, e.g., Endangered Species Act of 1973, 16 USC § 1540(g)(4) [16 USCS § 1540(g)(4)] ("costs of litigation (including reasonable attorney and expert witness

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fees)"), and afterwards,

3. Justice Stevens suggests that the expert fees requested here might be part of the "costs" allowed by § 1988 even if they are not part of the "attorney's fee." We are aware of no authority to support the counter-intuitive assertion that "[t]he term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation," post, at 104, 113 L Ed 2d at 86. In Crawford Fitting we held that the word "costs" in Federal Rule of Civil Procedure 54(d) is to be read in harmony with the word "costs" in 28 USC § 1920 [28 USCS § 1920], see 482 US at 441, 445, 96 L Ed 2d 385, 107 S Ct 2494, and we think the same is true of the word "costs" in § 1988. We likewise see nothing to support Justice Stevens' speculation that the court below or the parties viewed certain disbursements by the hospital's attorneys as "costs" within the meaning of the statute. Rather, it is likely that these disbursements (billed directly to the client) were thought subsumed within the phrase "attorney's fee." See, e.g., Northcross v Board of Ed. of Memphis Schools, 611 F2d 624, 639 (CA6 1979) ("reasonable out-of-pocket expenses incurred by the attorney" included in § 1988 "attorney's fee" award).

see, e.g., Public Utility Regulatory Policies Act of 1978, 16 USC § 2632(a)(1) [16 USCS § 2632(a)(1)] ("reasonable attorneys' fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of [the litigant's] position"). These statutes encompass diverse categories of legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, and, significantly, civil rights: The Equal Access to Justice Act (EAJA), the counterpart to § 1988 for violation of federal rights by federal employees, states that " 'fees and other expenses' [as shifted by § 2412(d)(1)(A)] includes the reasonable expenses of expert witnesses . . . and reasonable attorney fees." 28 USC § 2412(d)(2)(A) [28 USCS § 2412(d)(2)(A)]. At least 34 statutes in 10 different titles of the US Code explicitly shift attorney's fees *and* expert witness fees.[4]

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4. In addition to the provisions discussed in the text, see Administrative Procedure Act, 5 USC § 504(b)(1)(A) [5 USCS § 504(b)(1)(A)] (added 1980) ("reasonable expenses of expert witnesses . . . and reasonable attorney or agent fees"); Federal Trade Commission Act, 15 USC § 57a(h)(1) [15 USCS § 57a(h)(1)] (added 1975) ("reasonable attorneys' fees, expert witness fees and other costs of participating in a rulemaking proceeding"); Petroleum Marketing Practices Act, 15 USC §§ 2805(d)(1)(C), 2805(d)(3) [15 USCS §§ 2805(d)(1)(C), 2805(d)(3)] ("reasonable attorney and expert witness fees"); National Historic Preservation Act Amendments of 1980, 16 USC § 470w-4 [16 USCS § 470w-4] ("attorneys' fees, expert witness fees, and other costs of participating in such action"); Federal Power Act, 16 USC § 825q-1(b)(2) [16 USCS § 825q-1(b)(2)] (added 1978) ("reasonable attorney's fees, expert witness fees and other costs of intervening or participating in any proceeding [before the Federal Energy Regulatory Commission]"); Tax Equity and Fiscal Responsibility Act of 1982, 26 USC § 7430(c)(1) [26 USCS § 7430(c)(1)] ("reasonable expenses of expert witnesses . . . and reasonable fees paid . . . for the services of attorneys"); Surface Mining Control and Reclamation Act of 1977, 30 USC § 1270(d) [30 USCS § 1270(d)] ("costs of litigation (including attorney and expert witness fees)"); Deep Seabed Hard Mineral Resources Act, 30 USC § 1427(c) [30 USCS § 1427(c)] (enacted 1980) ("costs of litigation, including reasonable attorney and expert witness fees"); Federal Oil and Gas Royalty Management Act of 1982, 30 USC § 1734(a)(4) [30 USCS § 1734(a)(4)] ("costs of litigation including reasonable attorney and expert witness fees"); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 USC § 928(d) [33 USCS § 928(d)] ("In cases where an attorney's fee is awarded . . . there may be further assessed . . . as costs, fees and mileage for necessary witnesses"); Federal Water Pollution Control Act Amendments of 1972, and 1987 amendment, 33 USC §§ 1365(d), 1369(b)(3) [33 USCS §§ 1365(d), 1369(b)(3)] ("costs of litigation (including reasonable attorney and expert witness fees)"); Oil Pollution Act of 1990, 33 USC § 2706(g) (1988 ed, Supp II) [33 USCS § 2706(g)] (same); Marine Protection, Research, and Sanctuaries Act of 1972, 33 USC § 1415(g)(4) [33 USCS § 1415(g)(4)] (same); Deepwater Port Act of 1974, 33 USC § 1515(d) [33 USCS § 1515(d)] (same); Act to Prevent Pollution from Ships, 33 USC § 1910(d) [33 USCS § 1910(d)] (enacted 1980) (same); Safe Drinking Water Act, 42 USC § 300j-8(d) [42 USCS § 300j-8(d)] (enacted 1974) (same); National Childhood Vaccine Injury Act of 1986, 42 USC § 300aa-31(c) [42 USCS § 300aa-31(c)] (same); Noise Control Act of 1972, 42 USC § 4911(d) [42 USCS § 4911(d)] (same); Energy Reorganization Act of 1974, 42 USC § 5851(e)(2) [42 USCS § 5851(e)(2)] (same); Energy Policy and Conservation Act, 42 USC § 6305(d) [42 USCS § 6305(d)] (enacted 1975) (same); Clean Air Amendments of 1970, 42 USC §§ 7413b, 7604(d), 7607(f) [42 USCS §§ 7413b, 7604(d), 7607(f)] (same), and of 1977, 42 USC § 7622(b)(2)(B) [42 USCS § 7622(b)(2)(B)] ("all costs and expenses (including attorneys' and expert witness fees) reasonably incurred"); Powerplant and Industrial Fuel Use Act of 1978, 42 USC § 8435(d) [42 USCS § 8435(d)] ("costs of litigation (including reasonable attorney and expert witness fees)"); Ocean Thermal Energy Conversion Act of 1980, 42 USC § 9124(d) [42 USCS § 9124(d)] (same); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC § 9659(f) [42 USCS § 9659(f)] (added 1986) (same); Emergency Planning and Community Right-to-Know Act of 1986, 42 USC § 11046(f) [42 USCS § 11046(f)] (same); Outer Continental Shelf Lands Act Amend-

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The laws that refer to fees for nontestimonial expert services are less common, but they establish a similar usage both before and after 1976: Such fees are referred to *in addition to* attorney's fees when a shift is intended. A provision of the Criminal Justice Act of 1964, 18 USC § 3006A(e) [18 USCS § 3006A(e)], directs the court to reimburse appointed counsel for expert fees necessary to the defense of indigent criminal defendants—even though the immediately preceding provision, § 3006A(d), already directs that appointed defense counsel be paid a designated hourly rate plus "expenses reasonably incurred." WVUH's position must be that expert fees billed to a client through an attorney are "attorney's fees" because they are

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to be treated as part of the expenses of the attorney; but if this were normal usage, they would have been reimbursable under the Criminal Justice Act as "expenses reasonably incurred"—and subsection 3006A(e) would add nothing to the recoverable amount. The very heading of that subsection, "Services *other than* counsel" (emphasis added), acknowledges a distinction between services provided by the attorney himself and those provided to the attorney (or the client) by a nonlegal expert.

To the same effect is the 1980 EAJA, which provides: " 'fees and other expenses' [as shifted by § 2412(d)(1)(A)] includes the reasonable expenses of expert witnesses, *the reasonable cost of any study, analysis, engineering report, test, or project* which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." 28 USC § 2412(d)(2)(A) [28 USCS § 2412(d)(2)(A)] (emphasis added). If the reasonable cost of a "study" or "analysis"—which is but another way of describing nontestimonial expert services—is by common usage already included in the "attorney fees," again a significant and highly detailed part of the statute becomes redundant. The Administrative Procedure Act, 5 USC § 504(b)(1)(A) [5 USCS § 504(b)(1)(A)] (added 1980), and the Tax Equity and Fiscal Responsibility Act of 1982, 26 USC § 7430(c)(1) [26 USCS § 7430(c)(1)], contain similar language. Also reflecting the same usage are two railroad regulation statutes, the Regional Rail Reorganization Act of 1973, 45 USC §§ 726(f)(9) [45 USCS §§ 726(f)(9)] ("costs and expenses (including reasonable fees of accountants, experts, and attorneys) actually incurred"), and 741(i) ("costs and expenses (including fees of accountants, experts, and attorneys), actually and reasonably incurred"), and the Railroad Revitalization and Regulatory Reform Act of 1976, 45 USC § 854(g) [45 USCS § 854(g)] ("costs and expenses (including fees of accountants, experts, and attorneys) actually and reasonably incurred").[5]

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ments of 1978, 43 USC § 1349(a)(5) [43 USCS § 1349(a)(5)] ("costs of litigation, including reasonable attorney and expert witness fees"); Hazardous Liquid Pipeline Safety Act of 1979, 49 USC App § 2014(e) [49 USCS Appx § 2014(e)] ("costs of suit, including attorney's fees and reasonable expert witnesses fees").

5. WVUH cites a House Conference Committee Report from a statute passed in 1986, stating: "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." HR Conf Rep No. 99-687, p 5 (1986) (discussing the Handicapped Children's Protection Act of 1986, 20 USC § 1415(e)(4)(B) [20 USCS § 1415(e)(4)(B)]). In our view this undercuts rather than supports WVUH's position: The specification would have been quite

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We think this statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense. If, as WVUH argues, the one includes the other, dozens of statutes referring to the two separately become an inexplicable exercise in redundancy.

IV

[1d] WVUH argues that at least in pre-1976 *judicial* usage the phrase "attorney's fees" included the fees of experts. To support this proposition, it relies upon two historical assertions: first, that pre-1976 courts, when exercising traditional equitable discretion in shifting attorney's fees, taxed as an element of such fees the expenses related to expert services; and second, that pre-1976 courts shifting attorney's fees pursuant to statutes identical in phrasing to § 1988 allowed the recovery of expert fees. We disagree with these assertions. The judicial background against which Congress enacted § 1988 mirrored the statutory background: Expert fees were regarded not as a subset of attorney's fees, but as a distinct category of litigation expense.

Certainly it is true that prior to 1976 some federal courts shifted expert fees to losing parties pursuant to various equitable doctrines—sometimes in conjunction with attorney's fees. But they did not shift them *as an element of* attorney's fees. Typical of the courts' mode of analysis (though not necessarily of their results) is Fey v Walston & Co. 493 F2d 1036, 1055-1056 (CA7 1974), a case brought under the federal securities laws. Plaintiff won and was awarded various expenses:

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"Included in the . . . costs awarded by the [district] court were the sum of $1,700 for plaintiff's expert witness, expenses of an accountant in the amount of $142, and of an illustrator-diagrammer for $50 . . . and attorneys' fees of $15,660." The court treated these items separately: The services of the accountant and illustrator (who did not testify at trial) were "costs" which could be fully shifted in the discretion of the district court; the expert witness fees also could be shifted, but only as limited by § 1821; the attorney's fees were not costs and could not be shifted at all because the case did not fit any of the traditional equitable doctrines for awarding such fees. Id., at 1056. See also In re Electric Power & Light Corp., 210 F2d 585, 587, 591 (CA2 1954) ("[Appellant] applied for an allowance for counsel fees of $35,975 and expenses . . . , and also for a fee of $2,734.28 for an expert accountant"; court permitted part of the attorney's fee but disallowed the expert witness fee), rev'd on other grounds sub nom SEC v Drexel & Co., 348 US 341, 99 L Ed 376, 75 S Ct 386 (1955); Kiefel v Las Vegas Hacienda, Inc., 404 F2d 1163, 1170-1171 (CA7 1968) (itemizing attorney's fee and expert witness fee separately, allowing part of the former and all of the latter permitted by § 1821); Burgess v Williamson, 506 F2d 870, 877-880 (CA5 1975) (applying Alabama law to shift attorney's fee but not expert witness fee); Henning v Lake Charles Harbor and Terminal District, 387 F2d 264, 267-268 (CA5 1968), on appeal after remand, 409 F2d 932, 937 (CA5 1969) (applying Louisiana law to

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unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art.

shift expert fees but not attorney's fee); Coughenour v Campbell Barge Line, Inc., 388 F Supp 501, 506 (WD Pa 1974) ("Plaintiffs' claim for counsel fees is denied [because defendant acted in good faith and thus equitable shifting is unavailable]. Plaintiff's claim for costs of medical expert witnesses is deemed proper insofar as they were necessary in establishing the claim . . .") (citations omitted).

Even where the courts' holdings treated attorney's fees and expert fees the same (i.e., granted both or denied both),

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their analysis discussed them as separate categories of expense. See, e.g., Wolf v Frank, 477 F2d 467, 480 (CA5 1973) ("The reimbursing of plaintiffs' costs for attorney's fees *and* expert witness fees is supported . . . by well established equitable principles") (emphasis added); Kinnear-Weed Corp. v Humble Oil & Refining Co. 441 F2d 631, 636-637 (CA5 1971) ("[Appellant] argues that the district court erred in awarding costs, including attorneys' fees and expert witness fees to Humble"); Bebchick v Pub. Util. Comm'n, 115 US App DC 216, 233, 318 F2d 187, 204 (1963) ("It is also our view that reasonable attorneys' fees for appellants, . . . reasonable expert witness fees, and appropriate litigation expenses, should be paid by [appellee]"); Lipscomb v Wise, 399 F Supp 782, 798-801 (ND Tex 1975) (in separate analyses, finding both attorney's fees and expert witness fees barred). We have found no support for the proposition that, at common law, courts shifted expert fees *as an element of* attorney's fees.

Of arguably greater significance than the courts' treatment of attorney's fees *versus* expert fees at common law is their treatment of those expenses under statutes containing fee-shifting provisions similar to § 1988. WVUH contends that in some cases courts shifted expert fees as well as the statutorily authorized attorney's fees—and thus must have thought that the latter included the former. We find, however, that the practice, at least in the overwhelming majority of cases, was otherwise.

Prior to 1976, the leading fee-shifting statute was the Clayton Act, 38 Stat 731, as amended, 15 USC § 15 [15 USCS § 15] (shifting "the cost of suit, including a reasonable attorney's fee"). As of 1976, four Circuits (six Circuits, if one includes summary affirmances of district court judgments) had held that this provision did not permit a shift of expert witness fees. Union Carbide & Carbon Corp. v Nisley, 300 F2d 561, 586-587 (CA10 1961) (accountant's fees); Twentieth Century Fox Film Corp. v

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Goldwyn, 328 F2d 190, 223-224 (CA9 1964) (accounting fees); Advance Business Systems & Supply Co. v SCM Corp., 287 F Supp 143, 164 (Md 1968) (accountant's fees), aff'd, 415 F2d 55 (CA4 1969); Farmington Dowel Products Co. v Forster Mfg. Co. 297 F Supp 924, 930 (Me) (expert witness fees), aff'd, 421 F2d 61 (CA1 1969); Trans World Airlines, Inc. v Hughes, 449 F2d 51, 81 (CA2 1971) (expert fees), rev'd on other grounds, 409 US 363, 34 L Ed 2d 577, 93 S Ct 647 (1973); Ott v Speedwriting Publishing Co., 518 F2d 1143, 1149 (CA6 1975) (expert witness fees); see also Brookside Theater Corp. v Twentieth Century-Fox Film Corp. 11 FRD 259, 267 (WD Mo 1951) (expert witness fees). No court had held otherwise. Also instructive is pre-1976 practice under the federal patent laws, which provided, 35 USC § 285 [35 USCS § 285], that "[t]he court in excep-

tional cases may award reasonable attorney fees to the prevailing party." Again, every court to consider the matter as of 1976 thought that this provision conveyed no authority to shift expert fees. Specialty Equipment & Machinery Corp. v Zell Motor Car Co., 193 F2d 515, 521 (CA4 1952) ("Congress having dealt with the subject of costs in patent cases and having authorized the taxation of reasonable attorneys fees without making any provision with respect to . . . fees of expert witnesses must presumably have intended that they be not taxed"); accord, Chromalloy American Corp. v Alloy Surfaces Co., 353 F Supp 429, 431 n 1, 433 (Del 1973); ESCO Corp. v Tru-Rol Co., 178 USPQ 332, 333 (Md 1973); Scaramucci v Universal Mfg. Co. 234 F Supp 290, 291-292 (WD La 1964); Prashker v Beech Aircraft Corp., 24 FRD 305, 313 (Del. 1959).

WVUH contends that its position is supported by Tasby v Estes, 416 F Supp 644, 648 (ND Tex 1976), and Davis v County of Los Angeles, 8 FEP Cases 244, 246 (CD Cal 1974). Even if these cases constituted solid support for the proposition advanced by the hospital, they would hardly be sufficient to overcome the weight of authority cited above. But, in any case, we find neither opinion to be a clear example of contrary

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usage. Without entering into a detailed discussion, it suffices to say, as to Davis (where the expert fee award was in any event uncontested), that the opinion does not cite the statute, 42 USC § 2000e-5 [42 USCS § 2000e-5], as the basis for its belief that the expert fee could be shifted, and considers expert fees in a section separate from that dealing with attorney's fees. Given what was then the state of the law in the Ninth Circuit, and the District Court's citation, 8 FEP Cases, at 246, of at least one case that is avowedly an equitable discretion case, see NAACP v Allen, 340 F Supp 703 (MD Ala 1972), it is likely that the District Court thought the shifting of the fee was authorized under its general equitable powers, or under Federal Rule of Civil Procedure 54(d). As for Tasby, that case unquestionably authorized a shift of expert witness fees pursuant to an attorney's-fee-shifting statute, 20 USC § 1617 (1976 ed) [20 USCS § 1617]. The basis of that decision, however, was not the court's own understanding of the statutory term "attorney's fees," but rather its belief (quite erroneous) that our earlier opinion in Bradley v Richmond School Bd., 416 US 696, 40 L Ed 2d 476, 94 S Ct 2006 (1974), had adopted that interpretation. Thus, WVUH has cited not a single case, and we have found none, in which it is clear (or in our view even likely) that a court understood the statutory term "attorney's fees" to include expert fees.[6]

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6. The hospital also cites Fairley v Patterson, 493 F2d 598 (CA5 1974), and Norris v Green, 317 F Supp 100, 102 (ND Ala 1965). But in Fairley the court, remanding for reconsideration of the fee award, was explicitly equivocal as to whether "court costs" other than the ones normally assessable under § 1920 were awardable under the statute in question (the Voting Rights Act of 1965, whose fee-shifting provision parallels § 1988), or rather "should have to meet the harder discretionary standards" applicable to the award of fees pursuant to equitable discretion. 493 F2d, at 606, n 11. In any event, Fairley did not consider expert witnesses explicitly, and there is no indication that the court necessarily included expert fees within its (undefined) category of "court costs."

As for Norris, that case awarded fees pursuant to 29 USC § 501(b) [29 USCS § 501(b)], which is *not* parallel to § 1988, since it authorizes the shifting of "fees of counsel . . . *and*

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In sum, we conclude that at the time this provision was enacted neither statutory nor judicial usage regarded the phrase "attorney's fees" as embracing fees for experts' services.

V

WVUH suggests that a distinctive meaning of "attorney's fees" should be adopted with respect to § 1988 because this statute was meant to overrule our decision in Alyeska Pipeline Service Co. v Wilderness Society, 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612 (1975). As mentioned above, prior to 1975 many courts awarded expert fees and attorney's fees in certain circumstances pursuant to their equitable discretion. In Alyeska, we held that this discretion did not extend beyond a few exceptional circumstances long recognized by common law. Specifically, we rejected the so-called "private attorney general" doctrine recently created by some lower federal courts, see, e. g., La Raza Unida v Volpe, 57 FRD 94, 98-102 (ND Cal 1972), which allowed equitable fee shifting to plaintiffs in certain types of civil rights litigation. 421 US, at 269, 44 L Ed 2d 141, 95 S Ct 1612. WVUH argues that § 1988 was intended to restore the pre-Alyeska regime—and that, since expert fees were shifted then, they should be shifted now.

Both chronology and the remarks of sponsors of the bill that became § 1988 suggest that at least some members of Congress viewed it as a response to Alyeska. See, e. g., S Rep No. 94-1011, pp 4, 6 (1976). It is a considerable step, however, from this proposition to the conclusion the hospital would have us draw, namely, that § 1988 should be read as a reversal of Alyeska in all respects.

[1e, 4] By its plain language and as unanimously construed in the courts, § 1988 is both broader and narrower than the pre-Alyeska regime. Before Alyeska, civil rights plaintiffs could

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recover fees pursuant to the private attorney general doctrine only if private enforcement was necessary to defend important rights benefiting large numbers of people, and cost barriers might otherwise preclude private suits. La Raza Unida, supra, at 98-101. Section 1988 contains no similar limitation—so that in the present suit there is no question as to the propriety of shifting WVUH's *attorney's* fees, even though it is highly doubtful they could have been awarded under pre-Alyeska equitable theories. In other respects, however, § 1988 is not as broad as the former regime. It is limited, for example, to violations of specified civil rights statutes—which means that it would not have reversed the outcome of Alyeska itself, which involved not a civil rights statute but the National Environmental Policy Act of 1969, 42 USC § 4321 et seq. [42 USCS §§ 4321 et seq.]. Since it is clear that, in many respects, § 1988 was not meant to return us precisely to the pre-Alyeska regime, the objective of achieving such a return is no reason to depart from the normal import of the text.

[1f, 5] WVUH further argues that

. . . *expenses necessarily paid or incurred.*" (Emphasis added.) There is no indication in the opinion that the court thought the expert fees were part of the former rather than the latter—and the court discussed them separately from attorney's fees.

the congressional purpose in enacting § 1988 must prevail over the ordinary meaning of the statutory terms. It quotes, for example, the House Committee Report to the effect that "the judicial remedy [must be] full and complete," HR Rep No. 94-1558, p 1 (1976), and the Senate Committee Report to the effect that "[c]itizens must have the opportunity to recover what it costs them to vindicate [civil] rights in court," S Rep No. 94-1011, supra, at 2. As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. See Rodriguez v United States, 480 US 522, 525-526, 94 L Ed 2d 533, 107 S Ct 1391 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the

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course of the enactment process. See United States v Ron Pair Enterprises, Inc. 489 US 235, 241, 103 L Ed 2d 290, 109 S Ct 1026 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms' "), quoting Caminetti v United States, 242 US 470, 485, 61 L Ed 442, 37 S Ct 192 (1917). Congress could easily have shifted "attorney's fees and expert witness fees," or "reasonable litigation expenses," as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction.

[1g] WVUH asserts that we have previously been guided by the "broad remedial purposes" of § 1988, rather than its text, in a context resolving an "analogous issue": In Missouri v Jenkins, 491 US 274, 285, 105 L Ed 2d 229, 109 S Ct 2463 (1989), we concluded that § 1988 permitted separately billed paralegal and law-clerk time to be charged to the losing party. The trouble with this argument is that Jenkins did *not* involve an "analogous issue," insofar as the relevant considerations are concerned. The issue there was not, as WVUH contends, whether we would permit our perception of the "policy" of the statute to overcome its "plain language." It was not remotely plain in Jenkins that the phrase "attorney's fee" did not include charges for law-clerk and paralegal services. Such services, like the services of "secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product," id., at 285, 105 L Ed 2d 229, 109 S Ct 2463, had traditionally been included in calculation of the lawyers' hourly rates. Only recently had there arisen "the 'increasingly widespread custom of separately billing for [such] services,' " id., at 286, 105 L Ed 2d 229, 109 S Ct 2463 (quoting from Ramos v Lamm, 713 F2d 546, 558 (CA10 1983)). By contrast, there has never been, to our knowledge, a practice of including the cost of expert services within attorneys' hourly rates. There was also no record in Jenkins—as there is a lengthy record here—of statutory usage that recognizes a distinction between the charges at issue and attorney's fees. We do not know of a single statute that shifts clerk or paralegal fees separately; and even those, such as the EAJA, which comprehensively

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define the assessable "litigation costs" make no separate mention of clerks or paralegals. In other words, Jenkins involved a respect in which the term "attorney's fees" (giving the losing argument the benefit of the doubt) was genuinely ambiguous; and we resolved that ambiguity not by invoking some policy that supersedes the text of the statute, but by concluding that charges of this sort had traditionally been included in attorney's fees and that separate billing should make no difference. The term's application to expert fees is not ambiguous; and if it were the means of analysis employed in Jenkins would lead to the conclusion that since such fees have not traditionally been included within the attorney's hourly rate they are not attorney's fees.

WVUH's last contention is that, even if Congress plainly did not include expert fees in the fee-shifting provisions of § 1988, it would have done so had it thought about it. Most of the pre-§ 1988 statutes that explicitly shifted expert fees dealt with environmental litigation, where the necessity of expert advice was readily apparent; and when Congress later enacted the EAJA, the federal counterpart of § 1988, it explicitly included expert fees. Thus, the argument runs, the 94th Congress simply forgot; it is our duty to ask how they would have decided had they actually considered the question. See Friedrich v Chicago, 888 F2d 511, 514 (CA7 1989) (awarding expert fees under § 1988 because a court should "complete . . . the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly").

[1h, 6, 7a] This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. See 2 J. Sutherland, Statutory Construction § 5201 (3d F. Horack ed 1943). We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an

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earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the corpus juris. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional "forgetfulness" cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe. We thus reject this last argument for the same reason that Justice Brandeis, writing for the Court, once rejected a similar (though less explicit) argument by the United States:

"[The statute's] language is plain

and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." Iselin v United States, 270 US 245, 250-251, 70 L Ed 566, 46 S Ct 248 (1926).[7]

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* * *

[1i] For the foregoing reasons, we conclude that § 1988 conveys no authority to shift expert fees. When experts appear at trial, they are of course eligible for the fee provided by § 1920 and § 1821—which was allowed in the present case by the Court of Appeals.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

SEPARATE OPINIONS

Justice **Marshall,** dissenting.

As Justice Stevens demonstrates, the Court uses the implements of literalism to wound, rather than to minister to, congressional intent in this case. That is a dangerous usurpation of congressional power when any statute is involved. It is troubling for special reasons, however, when the statute at issue is clearly designed to give access to the federal courts to persons and groups attempting to vindicate vital civil rights. A District Judge has ably put the point in an analogous context:

> "At issue here is much more than the simple question of how much [plaintiff's] attorneys should receive as attorney fees. At issue is . . . continued full and vigorous commitment to this Nation's lofty, but as yet unfulfilled, agenda to make the promises of this land available to all citizens, without regard to race or sex or other impermissible characteristic. There are at least two ways to undermine this commitment. The first is open and direct: a repeal of this Nation's anti-discrimination laws. The second is more indirect and, for this reason, somewhat insidious: to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their
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> [499 US 103]
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> cases to court." Hidle v Geneva County Bd. of Ed. 681 F Supp 752, 758-759 (MD Ala 1988) (awarding attorney's fees and expenses under Title VII of the Civil Rights Act of 1964.).

Justice **Stevens,** with whom Justice **Marshall** and Justice **Blackmun** join, dissenting.

Since the enactment of the Statute

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7. **[7b]** WVUH at least asks us to guess the preferences of the *enacting* Congress. Justice Stevens apparently believes our role is to guess the desires of the *present* Congress, or of Congresses yet to be. "Only time will tell," he says, "whether the Court, with its literal reading of § 1988, has correctly interpreted the will of Congress," post, at 116, 113 L Ed 2d, at 94. The implication is that today's holding will be proved wrong if Congress amends the law to conform with his dissent. We think not. The "will of Congress" we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of "interpreting" the law but of "intuiting" or "predicting" it. Our role is to say what the law, as hitherto enacted, *is;* not to forecast what the law, as amended, *will be.*

of Wills in 1540,[1] careful draftsmen have authorized executors to pay the just debts of the decedent, including the fees and expenses of the attorney for the estate. Although the omission of such an express authorization in a will might indicate that the testator had thought it unnecessary, or that he had overlooked the point, the omission would surely not indicate a deliberate decision by the testator to forbid any compensation to his attorney.

In the early 1970's, Congress began to focus on the importance of public interest litigation, and since that time, it has enacted numerous fee-shifting statutes. In many of these statutes, which the majority cites at length, see ante, at 88-92, 113 L Ed 2d, at 76-79, Congress has expressly authorized the recovery of expert witness fees as part of the costs of litigation. The question in this case is whether, notwithstanding the omission of such an express authorization in 42 USC § 1988 [42 USCS § 1988], Congress intended to authorize such recovery when it provided for "a reasonable attorney's fee as part of the costs." In my view, just as the omission of express authorization in a will does not preclude compensation to an estate's attorney, the omission of express authorization for expert witness fees in a fee-shifting provision should not preclude the award of expert witness fees. We should look at the way in which the Court has interpreted the text of *this statute* in the past, as well as *this statute's* legislative history, to resolve the question before us, rather than looking at the text of the many other statutes that the majority cites in which Congress expressly recognized the need for compensating expert witnesses.

[499 US 104]

I

Under either the broad view of "costs" typically assumed in the fee-shifting context or the broad view of "a reasonable attorney's fee" articulated by this Court, expert witness fees are a proper component of an award under § 1988. Because we are not interpreting these words for the first time, they should be evaluated in the context that this and other courts have already created.[2]

The term "costs" has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation.[3] The cost bill in this case illustrates the point. Leaving aside the question of expert witness fees, the prevailing party sought reimbursement for $45,867 in disbursements, see App to Pet for Cert C-1, which plainly would not have been recoverable costs under 28 USC § 1920 [28 USCS § 1920].[4] These expenses, including such items as travel and long-distance telephone calls, were allowed by the District Court and were not even questioned by respondent. They were expenses that a retained lawyer would ordinarily bill to his or her client. They were accordingly considered proper "costs" in a case of this kind.

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1. 32 Hen VIII, ch 1 (1540).

2. My view, as I have expressed in the past, is that we should follow Justice Cardozo's advice to the judge to "lay [his] own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921).

3. See, e. g., 28 USC § 1920 [28 USCS § 1920]; see also Fed Rule Civ Proc 54(d).

4. Quoted in pertinent part, ante, at 86, 113 L Ed 2d, at 75.

The broad construction typically given to "costs" in the fee-shifting context is highlighted by The Chief Justice's contrasting view in Missouri v Jenkins, 491 US 274, 105 L Ed 2d 229, 109 S Ct 2463 (1989), in which he argued that paralegal and law clerk fees could not even be awarded as "costs" under 28 USC § 1920 [28 USCS § 1920]. One of the issues in Jenkins was the *rate* at which the services of law clerks and paralegals should be compensated. The State contended that actual cost, rather than market value, should govern. It did not, however, even question the propriety of

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reimbursing the prevailing party for the work of these nonlawyers. Only The Chief Justice—in a lone dissent the reasoning of which is now endorsed by the Court—advanced a purely literal interpretation of the statute. He wrote:

"I also disagree with the State's suggestion that law clerk and paralegal expenses incurred by a prevailing party, if not recoverable at market rates as 'attorney's fees' under § 1988, are nonetheless recoverable at actual cost under that statute. The language of § 1988 expands the traditional definition of 'costs' to include 'a reasonable attorney's fee,' but it cannot fairly be read to authorize the recovery of all other out-of-pocket expenses actually incurred by the prevailing party in the course of litigation. Absent specific statutory authorization for the recovery of such expenses, the prevailing party remains subject to the limitations on cost recovery imposed by Federal Rule of Civil Procedure 54(d) and 28 USC § 1920 [28 USCS § 1920], which govern the taxation of costs in federal litigation where a cost-shifting statute is not applicable. Section 1920 gives the district court discretion to tax certain types of costs against the losing party in any federal litigation. The statute specifically enumerates six categories of expenses which may be taxed as costs: fees of the court clerk and marshal; fees of the court reporter; printing fees and witness fees; copying fees; certain docket fees; and fees of court-appointed experts and interpreters. We have held that this list is exclusive. Crawford Fitting Co. v J. T. Gibbons, Inc., 482 US 437 [96 L Ed 2d 385, 107 S Ct 2494] (1987). Since none of these categories can possibly be construed to include the fees of law clerks and paralegals, I would also hold that reimbursement for these expenses may not be separately awarded at actual cost." 491 US, at 297-298, 105 L Ed 2d 229, 109 S Ct 2463.

Although The Chief Justice argued that charges for the work of paralegals and law clerks were not part of the narrowly

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defined "costs" that were reimbursable under § 1920, nor were they part of an "attorney's fee" reimbursable under § 1988, the Court did not reach The Chief Justice's point about costs because it held in Jenkins that such expenses were part of a "reasonable attorney's fee" authorized by § 1988, and thus could be reimbursed at market rate. In the Court's view, a "reasonable attorney's fee" referred to "a reasonable fee for the work product of an attorney." Id., at 285, 105 L Ed 2d 229, 109 S Ct 2463. We explained:

> "[T]he fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others

whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals, as well as that of attorneys." Ibid.

In Jenkins, the Court acknowledged that the use of paralegals instead of attorneys reduced the cost of litigation, and " 'by reducing the spiraling cost of civil rights litigation, further[ed] the policies underlying civil rights statutes.' " Id., at 288, 105 L Ed 2d 229, 109 S Ct 2463. If attorneys were forced to do the work that paralegals could just as easily perform under the supervision of an attorney, such as locating and interviewing witnesses or compiling statistical and financial data, then "it would not be surprising to see a greater amount of such work performed by attorneys themselves, thus increasing the overall cost of litigation." Id., at 288, n 10, 105 L Ed 2d 229, 109 S Ct 2463.

This reasoning applies equally to other forms of specialized litigation support that a trial lawyer needs and that the client customarily pays for, either directly or indirectly. Although reliance on paralegals is a more recent development than the use of traditional expert witnesses, both paralegals and expert

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witnesses perform important tasks that save lawyers' time and enhance the quality of their work product. In this case, it is undisputed that the District Court correctly found that the expert witnesses were "essential" and "necessary" to the successful prosecution of the plaintiff's case,[5] and that their data and analysis played a pivotal role in the attorney's trial preparation.[6] Had the attorneys attempted to perform the tasks that the experts performed, it obviously would have taken them far longer than the experts and the entire case would have been far more costly to the parties. As Judge Posner observed in a comparable case:

> "The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work. There is thus no basis for distinguishing Jenkins from the present case so far as time spent by these experts in educating the plaintiffs' lawyer is concerned . . . ." Friedrich v Chicago, 888 F2d 511, 514 (CA7 1989).

In Jenkins, we interpreted the award of "a reasonable *attorney's* fee" to cover charges for paralegals and law clerks, even though a paralegal or law clerk is not an attor-

5. App to Pet for Cert C-2; App 117.

6. The expert witnesses here played a pivotal role in their nontestimonial, rather than simply their testimonial, capacity. See Pet for Cert 6-7; App 120-139.

ney. Similarly, the federal courts routinely allow an attorney's travel expenses or long-distance telephone calls to be awarded, even though they are not literally part of an "attorney's *fee,*" or part of "costs" as defined by 28 USC § 1920 [28 USCS § 1920]. To allow reimbursement of these other categories of expenses, and yet not to include expert witness fees, is both

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arbitrary and contrary to the borad remedial purpose that inspired the fee-shifting provision of § 1988.

II

The Senate Report on the Civil Rights Attorney's Fees Awards Act of 1976 explained that the purpose of the proposed amendment to 42 USC § 1988 [42 USCS § 1988] was "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska Pipeline Service Co. v Wilderness Society, 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612 (1975), and to achieve consistency in our civil rights laws."[7] S Rep No. 94-1011, p 1 (1976). The Senate Committee on the Judiciary wanted to level the playing field so that private citizens, who might have little or no money, could still serve as "private attorneys general" and afford to bring actions, even against state or local bodies, to enforce the civil rights laws. The Committee acknowledged that "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover *what it costs them* to vindicate these rights in court." Id., at 2 (emphasis added). According to the Committee, the bill would create "no startling new remedy," but would simply provide "the technical requirements" requested by the Supreme Court in Alyeska, so that courts could "continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision." Id., at 6.

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To underscore its intention to return the courts to their pre-Alyeska practice of shifting fees in civil rights cases, the Senate Committee's Report cited with approval not only several cases in which fees had been shifted, but also all of the cases contained in Legal Fees, Hearings before the Sub-committee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong, 1st Sess, pt 3, pp 888-1024, 1060-1062 (1973) (hereinafter Senate Hearings). See S Rep No. 94-1011, at 4, n 3. The cases collected in the 1973 Senate Hearings included many in which courts had permitted the shifting of costs, including expert witness fees. At the time when the Committee referred to these cases, though several were later reversed, it used them to make the point that prior to Alyeska, courts awarded attorney's fees and costs, including expert witness fees, in civil rights cases, and that they did so in order to encourage private

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7. In Alyeska Pipeline Service Co. v Wilderness Society, 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612 (1975), the Court held that courts were not free to fashion new exceptions to the American Rule, according to which each side assumed the cost of its own attorney's fees. The Court reasoned that it was not the judiciary's role "to invade the legislature's province by redistributing litigation costs . . . ," id., at 271, 44 L Ed 2d 141, 95 S Ct 1612, and that it would be "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation . . . ." Id., at 247, 44 L Ed 2d 141, 95 S Ct 1612.

citizens to bring such suits.[8] It was to this pre-Alyeska regime, in which courts could award expert witness fees along with attorney's fees, that the Senate Committee intended to return through the passage of the fee-shifting amendment to § 1988.

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The House Report expressed concerns similar to those raised by the Senate Report. It noted that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens" and that the House bill was "designed to give such persons effective access to the judicial process . . . ." HR Rep No. 94-1558, p 1 (1976). The House Committee on the Judiciary concluded that "civil rights litigants were suffering very severe hardships because of the Alyeska decision," and that the case had had a "devastating impact" and had created a "compelling need" for a fee-shifting provision in the civil rights context. Id., at 2-3.

According to both Reports, the record of House and Senate subcommittee hearings, consisting of the testimony and written submissions of public officials, scholars, practicing attorneys, and private citizens, and the questions of the legislators, makes clear that both committees were concerned with preserving access to the courts and encouraging public interest litigation.[9]

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It is fair to say that throughout the course of the hearings, a recurring theme was the desire to return to the pre-Alyeska practice in which courts could shift fees, including ex-

8. See, e.g., Beens v Erdahl, 349 F Supp 97, 100 (Minn 1972); Bradley v School Board of Richmond, 53 FRD 28, 44 (ED Va 1971) ("Fees for expert witnesses' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert"), rev'd, 472 F2d 318 (CA4 1972), vacated, 416 US 696, 40 L Ed 2d 476, 94 S Ct 2006 (1974); La Raza Unida v Volpe, No. 71-1166 (ND Cal, Oct. 19, 1972), reprinted in Senate Hearings, pt 3, pp 1060, 1062 (expert witness fees allowed because experts' testimony was "helpful to the court"); Pyramid Lake Paiute Tribe of Indians v Morton, 360 F Supp 669, 672 (DC 1973) ("The plaintiff's experts played a vital role in the resolution of the case, their work and testimony going to the heart of the matter. Accordingly, it seems entirely appropriate to award their fees as scheduled in the total amount of $20,488.72 . . ."), rev'd, 163 US App DC 90, 499 F2d 1095 (1974), cert denied, 420 US 962, 43 L Ed 2d 439, 95 S Ct 1351 (1975).

9. A frequently expressed concern was the need to undo the damage to public interest litigation caused by Alyeska. See, e.g., Awarding of Attorneys' Fees, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong, 1st Sess, 2, 41, 42, 43, 54, 82-85, 87, 90-92, 94, 103, 119-121, 123-125, 134, 150, 153-155, 162, 182-183, 269, 272-273, 370, 378-395, 416-418 (1975) (hereinafter House Hearings). Many who testified expressed the view that attorneys needed fee-shifting provisions so that they could afford to work on public interest litigation, see, e.g., id., at 66-67, 76, 78-79, 80, 89, 124-125, 137-142, 146, 158-159, 276-277, 278-280, 306-308; see also id., at 316-326; Senate Hearings, pt 3, pp 789-790, 855-857, 1115, and private citizens needed fee-shifting provisions so that they could be made whole again, see, e.g., House Hearings, pp 60, 189, 192, 254-255, 292, 328; see also id., at 106-111, 343-345, 347-349. For example, the private citizen who was brought into court by the Government and who later prevailed would still not be made whole, because he had to bear the costs of his own attorney's fees. The Senate Hearings also examined the average citizen's lack of access to the legal system. See, e.g., Senate Hearings, pts 1, 2, pp 1-2, 3-4, 273 (addressing question whether coal miners were receiving adequate legal coverage); id., pt 2, at 466, 470-471, 505-509, 515 (addressing question whether veterans were denied legal assistance by $10 contingent fee); id., at pt 3, 789, 791-796, 808-810 (Indians' access to lawyers); id., pt 3, at 1127, 1253-1254 (average citizen cannot afford attorney).

pert witness fees, and make those who acted as private attorneys general whole again, thus encouraging the enforcement of the civil rights laws.

The case before us today is precisely the type of public interest litigation that Congress intended to encourage by amending § 1988 to provide for fee shifting of a "reasonable attorney's fee as part of the costs." Petitioner, a tertiary medical center in West Virginia near the Pennsylvania border,[10] provides services to a large number of Medicaid recipients throughout Pennsylvania. In January 1986, when the Pennsylvania Department of Public Welfare notified petitioner of its new Medicaid payment rates for Pennsylvania Medicaid recipients, petitioner believed them to be below the minimum standards for reimbursement specified by the Social Security Act. Petitioner successfully challenged the adequacy of the State's payment system under 42 USC § 1983 [42 USCS § 1983].

This Court's determination today that petitioner must assume the cost of $104,133 in expert witness fees is at war with the congressional purpose of making the prevailing party whole. As we said in Hensley v Eckerhart, 461 US 424, 435, 76 L Ed 2d 40, 103 S Ct 1933 (1983), petitioner's recovery should be "fully compensatory," or, as we expressed in Jenkins, petitioner's recovery should be "comparable to what 'is traditional with attorneys compensated by a fee-paying client.' S Rep No. 94-1011, p 6 (1976)." 491 US, at 286, 105 L Ed 2d 229, 109 S Ct 2463.

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III

In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation. Thus, for example, in Christiansburg Garment Co. v EEOC, 434 US 412, 54 L Ed 2d 648, 98 S Ct 694 (1978), we rejected a "mechanical construction," id., at 418, 54 L Ed 2d 648, 98 S Ct 694, of the fee-shifting provision in § 706(k) of Title VII of the Civil Rights Act of 1964 that the prevailing defendant had urged upon us. Although the text of the statute drew no distinction between different kinds of "prevailing parties," we held that awards to prevailing plaintiffs are governed by a more liberal standard than awards to prevailing defendants. That holding rested entirely on our evaluation of the relevant congressional policy and found no support within the four corners of the statutory text. Nevertheless, the holding was unanimous and, to the best of my knowledge, evoked no adverse criticism or response in Congress.[11]

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10. A "tertiary" hospital provides a level of medical services that is generally complex and not provided by community hospitals. Brief for Petitioner 3, n 1.

11. Other examples of cases in which the Court eschewed the literal approach include Steelworkers v Weber, 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721 (1979), and Johnson v Transportation Agency, Santa Clara County, 480 US 616, 94 L Ed 2d 615, 107 S Ct 1442 (1987). Although the dissenters had the better textual argument in both cases, and urged the Court to read the words of the statute literally, the Court, in both cases, opted for a reading that took into account congressional purpose and historical context. See Steelworkers v Weber, 443 US, at 201, 61 L Ed 2d 480, 99 S Ct 2721 (Court rejected "literal construction of §§ 703(a) and (d)" and held that the statute must "be read against the background

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On those occasions, however, when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different. It is no coincidence that the Court's literal reading of Title VII, which led to the conclusion that disparate treatment of pregnant and nonpregnant persons was not discrimination on the basis of sex, see General Electric Co. v Gilbert, 429 US 125, 50 L Ed 2d 343, 97 S Ct 401 (1976), was repudiated by the 95th Congress;[12] that its literal reading of the "continuous physical presence" requirement in § 244(a)(1) of the Immigration and Nationality Act, which led to the view that the statute did not permit even temporary or inadvertent absences from this country, see INS v Phinpathya, 464 US 183, 78 L Ed 2d 401, 104 S Ct 584 (1984), was rebuffed by the 99th Congress;[13] that its literal reading of the word "program" in Title IX of the

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Education Amendments of 1972, which led to the Court's gratuitous limit on the scope of the antidiscrimination provisions of Title IX,[14] see Grove City College v Bell, 465 US 555, 79 L Ed 2d 516, 104 S Ct 1211 (1984), was rejected by the 100th Congress;[15] or

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of the legislative history of Title VII and the historical context from which the Act arose"); Johnson v Transportation Agency, 480 US, at 627, 94 L Ed 2d 615, 107 S Ct 1442 (legality of employer's affirmative action plan to be assessed according to criteria announced in Weber). Neither decision prompted an adverse congressional response.

Although there have been those who have argued that congressional inaction cannot be seen as an endorsement of this Court's interpretations, see, e.g., Johnson v Transportation Agency, 480 US, at 671-672, 94 L Ed 2d 615, 107 S Ct 1442 (Scalia, J., dissenting); Patterson v McLean Credit Union, 491 US 164, 175, n 1, 105 L Ed 2d 132, 109 S Ct 2363 (1989), that charge has been answered by the observation that "when Congress has been displeased with [the Court's] interpretation . . . , it has not hesitated to amend the statute to tell us so. . . . Surely, it is appropriate to find some probative value in such radically different congressional reactions to this Court's interpretations . . . ." Johnson v Transportation Agency, 480 US, at 629-630, n 7, 94 L Ed 2d 615, 107 S Ct 1442; see Patterson v McLean Credit Union, 491 US, at 200, 105 L Ed 2d 132, 109 S Ct 2363 (Brennan, J., concurring in judgment in part and dissenting in part) ("Where our prior interpretation of congressional intent was plausible, . . . we have often taken Congress' subsequent inaction as probative to varying degrees, depending upon the circumstances, of its acquiescence"). Since Congress has had an opportunity, albeit brief, to correct our broad reading of attorney's fees in Jenkins if it thought that we had misapprehended its purpose, the Court has no reason to change its approach to the fee-shifting provision of § 1988, as the majority does today.

12. See Pregnancy Discrimination Act of 1978, Pub L 95-555, 92 Stat 2076, 42 USC § 2000e(k) [42 USCS § 2000e(k)] (overturning General Electric Co. v Gilbert, 429 US 125, 50 L Ed 2d 343, 97 S Ct 401 (1976)).

13. Immigration Reform and Control Act of 1986, Pub L 99-603, § 315(b), 100 Stat 3440 ("An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence").

14. See Grove City College v Bell, 465 US, at 579, 79 L Ed 2d 516, 104 S Ct 1211 (Stevens, J., concurring in part and concurring in result) (Court should refrain from deciding issue not in dispute).

15. See Civil Rights Restoration Act of 1987, Pub L 100-259, 102 Stat 28, 20 USC § 1687 [20 USCS § 1687]. Congress was clear in expressing the need for the subsequent legislation: "Congress finds that—

"(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 . . . ; and

that its refusal to accept the teaching of earlier decisions in Wards Cove Packing Co. v Atonio, 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115 (1989) (reformulating order of proof and weight of parties' burdens in disparate-impact cases), and Patterson v McLean Credit Union, 491 US 164, 105 L Ed 2d 132, 109 S Ct 2363 (1989) (limiting scope of 42 USC § 1981 [42 USCS § 1981] to the making and enforcement of contracts), was overwhelmingly rejected by the 101st Congress,[16] and its refusal to accept the widely held view of lower courts about the scope of fraud, see McNally v United States, 483 US 350, 97 L Ed 2d 292, 107 S Ct 2875 (1987) (limiting mail

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fraud to protection of property), was quickly corrected by the 100th Congress.[17]

In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it "to take the time to revisit the matter"[18] and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error. As Judge Learned Hand explained, statutes are likely to be imprecise.

> "All [legislators] have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose." L. Hand, How Far Is a Judge Free in Rendering a Decision?, in The Spirit of Liberty 103, 106 (I. Dilliard ed 1952).

The Court concludes its opinion with the suggestion that disagreement with its textual analysis could only be based on the dissenters' preference for a "better" statute, ante, at 101, 113 L Ed 2d, at 84. It overlooks the possibility that a different view may be more faithful to Congress' command. The fact that Congress has consistently provided for the inclusion of expert

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"(2) legislative action is necessary to restore prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." 20 USC § 1687 [20 USCS § 1687] note.

16. See HR Conf Rep No. 101-856, p 1 (1990) (Civil Rights Act of 1990). Again, Congress was blunt about its purposes:

"The purposes of this Act are to—

"(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

"(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." Id., at 1-2.

The fact that the President vetoed the legislation does not undermine the conclusion that Congress viewed the Court's decisions as incorrect interpretations of the relevant statutes.

17. See Pub L 100-690, § 7603, 102 Stat 4508, 18 USC § 1346 [18 USCS § 1346] ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services").

18. Smith v Robinson, 468 US 992, 1031, 82 L Ed 2d 746, 104 S Ct 3457 (1984) (Brennan, J., dissenting).

witness fees in fee-shifting statutes when it considered the matter is a weak reed on which to rest the conclusion that the omission of

[499 US 116]

such a provision represents a deliberate decision to forbid such awards. Only time will tell whether the Court, with its literal reading[19] of § 1988, has correctly interpreted the will of Congress with respect to the issue it has resolved today.

I respectfully dissent.

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19. Seventy years ago, Justice Cardozo warned of the dangers of literal reading, whether of precedents or statutes:

"[Some judges'] notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." The Nature of the Judicial Process, at 20-21. (1921).

[499 US 117]

NORFOLK AND WESTERN RAILWAY COMPANY, et al., Petitioners

v

AMERICAN TRAIN DISPATCHERS' ASSOCIATION et al. (No. 89-1027)

CSX TRANSPORTATION, INC., Petitioner

v

BROTHERHOOD OF RAILWAY CARMEN et al. (No. 89-1028)

499 US 117, 113 L Ed 2d 95, 111 S Ct 1156

[Nos. 89-1027 and 89-1028]

Argued December 3, 1990. Decided March 19, 1991.

Decision: 49 USCS § 11341(a) held to exempt rail carriers from obligations under collective bargaining agreements as necessary to effect consolidations approved by Interstate Commerce Commission.

SUMMARY

These two, consolidated cases presented the question whether 49 USCS § 11341(a)—which provides that, where the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation, a carrier in the consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [the carrier] carry out the transaction"—exempts a carrier in an approved consolidation from legal obligations arising under a collective bargaining agreement. In one case, following approval by the ICC of the consolidation of two rail carriers, the newly consolidated carriers had proposed for reasons of efficiency to transfer certain employees of one carrier to another city. The labor union representing the affected employees contended that (1) the carriers' proposal involved a change in the collective bargaining agreement between the carrier and its employees that was subject to mandatory bargaining under the Railway Labor Act (RLA) (45 USCS §§ 151 et seq.); and (2) the carriers were required to preserve the affected employees' rights under the collective bargaining agreement and their right to union representation under the RLA. After negotiations failed to resolve these issues, arbitration was sought pursuant

Briefs of Counsel, p 747, infra.

to conditions imposed by the ICC generally upon rail carrier mergers to protect the interests of carrier employees. The arbitration committee ruled in the carriers' favor, stating that the proposed transfer of employees was an incident of the ICC-approved merger and that the provisions of the collective bargaining agreement and the RLA could be abrogated as necessary to implement the merger. On appeal, the ICC affirmed the ruling of the arbitration committee, stating that because the employee transfer was incident to the approved merger, it was by virtue of § 11341(a) not subject to conflicting laws. In the second case, a carrier formed by an ICC-approved consolidation proposed to close a repair shop and transfer the shop's employees to a similar shop at a different location. The union representing the employees contended that this proposal contravened its collective bargaining agreement. An arbitration committee ruled that (1) the collective bargaining agreement could be superseded to the extent that it impeded an operational change authorized or required by the ICC's approval of the consolidation; and (2) the repair work at the shop the carrier proposed to close could be transferred, because such a transfer was necessary to the original consolidation; but (3) employees protected against transfer by the collective bargaining agreement could not be transferred. On appeal, the ICC affirmed the ruling regarding the transfer of work, and reversed the ruling regarding the transfer of employees, stating that preventing the transfer of employees would effectively prevent implementation of the consolidation (4 ICC2d 641). On appeal of both cases, the United States Court of Appeals for the District of Columbia Circuit, considering the cases together, reversed and remanded the cases to the ICC, holding that § 11341(a) does not authorize the ICC to relieve a party of obligations under a collective bargaining agreement, which obligations impede implementation of an approved consolidation (279 App DC 239, 880 F2d 562).

On certiorari, the United States Supreme Court reversed and remanded for further proceedings. In an opinion by KENNEDY, J., joined by REHNQUIST, Ch. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, and SOUTER, JJ., it was held that § 11341(a) exempts a carrier in an ICC-approved consolidation from any legal obligations imposed by a collective bargaining agreement to the extent necessary to carry out the consolidation, because (1) the language of § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified, and includes the Railway Labor Act, which gives legal and binding effect to collective bargaining agreements between rail carriers and their employees; (2) this interpretation of § 11341(a) makes sense of the consolidation provisions of the Interstate Commerce Act, which were designed to promote economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure; and (3) this interpretation of § 11341(a) will not lead to bizarre results, inasmuch as the immunity provision does not exempt carriers from all law, but rather from all law as necessary to carry out an approved transaction.

STEVENS, J., joined by MARSHALL, J., dissented, expressing the view that the exemption in § 11341(a) does not include obligations imposed by private contracts.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Courts § 775; Interstate Commerce Commission § 39; Labor § 41; Statutes §§ 82, 83, 100, 109, 173, 248.5 — consolidation of rail carriers — exemption from other laws — collective bargaining agreements

1a-1f. 49 USCS § 11341(a), a part of the Interstate Commerce Act, exempts a rail carrier in a consolidation approved by the Interstate Commerce Commission from any legal obligations imposed by a collective bargaining agreement to the extent necessary to carry out the consolidation, because (1) the language of § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified, and includes the Railway Labor

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13 Am Jur 2d, Carriers § 36; 48A Am Jur 2d Labor and Labor Relations § 1698; Railroads §§ 331-333

49 USCS § 11341(a)

RIA Employment Coordinator ¶ LR-34,087

L Ed Digest, Interstate Commerce Commission § 39; Labor § 41

L Ed Index, Carriers; Collective Bargaining; Interstate Commerce Act or Commission, Railroads

Index to Annotations, Carriers; Collective Bargaining; Interstate Commerce Commission; Railroads

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's application of the rules of ejusdem generis and noscitur a sociis. 46 L Ed 2d 879.

When is subsequent business operation bound by existing collective bargaining agreement between labor union and predecessor employer. 88 ALR Fed 89.

Meaning of "willful" under provision of Railway Labor Act (45 USCS § 152(tenth)) making willful failure or refusal to comply with Act a criminal offense. 49 ALR Fed 611.

Breach of collective bargaining agreement as unfair labor practice under National Labor Relations Act, as amended (29 USCS § 158). 6 ALR Fed 589.

Act, which gives legal and binding effect to collective bargaining agreements between rail carriers and their employees; (2) the principle of ejusdem generis—which states that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration, but which does not control when the whole context dictates a different conclusion—does not require a different result, inasmuch as (a) because repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of § 11341(a), (b) the otherwise general term "all other law" includes, but is not limited to, "State and municipal law," showing that "all other law" refers to more than laws related to antitrust, and (c) the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the word "all," that the phrase "all other law" includes federal law other than the antitrust laws; (3) this conclusion is supported by prior case law in which the United States Supreme Court, construing a statute which was the immediate precursor of § 11341(a) and which was substantially identical to it, held that the contract rights under state law of minority shareholders—who contended that the terms of an ICC-approved merger diminished the value of their shares as guaranteed by the corporate charter—did not survive the merger agreement found by the ICC to be in the public interest; (4) this interpretation of § 11341(a) makes sense of the consolidation provisions of the Interstate Commerce Act, which were designed to promote economy and efficiency in interstate transportation by removing the burdens of excessive expenditure while also requiring the ICC to accommodate to the greatest extent possible the interests of affected carrier employees before approving a consolidation; and (5) this interpretation of § 11341(a) will not lead to bizarre results, inasmuch as the immunity provision of the statute does not exempt carriers from all law, but rather from all law as necessary to carry out an approved consolidation. (Stevens and Marshall, JJ., dissented from this holding.)

Appeal § 1662 — mootness — interpretation of statute — alternative basis for decision on remand

2a, 2b. On certiorari from a judgment of a United States Court of Appeals which (1) held that 49 USCS § 11341(a)—which provides that, where the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation, a carrier in the consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [the carrier] carry out the transaction"—does not exempt a rail carrier in an approved consolidation from obligations imposed by a collective bargaining agreement; (2) reversed rulings by the ICC in two cases stating that under § 11341(a), carriers in approved consolidations who proposed to implement the consolidations by taking measures which allegedly violated collective bargaining agreements, were not obligated to honor the collective bargaining agreements or to engage in procedures mandated by the Railway Labor Act (RLA) (45

USCS §§ 151 et seq.) for the resolution of labor disputes; and (3) remanded the cases for consideration by the ICC (a) whether § 13341(a) could operate to override provisions of the RLA, and (b) whether, under "labor-protective" conditions promulgated by the ICC pursuant to 49 USCS § 11347 and applying to rail carrier consolidations, an arbitration committee hearing a labor dispute arising from an approved railroad merger may override provisions of a collective bargaining agreement, the United States Supreme Court—where the ICC, on remand from the United States Court of Appeals, has (1) adhered to the Court of Appeals' ruling that § 11341(a) does not authorize it to override provisions of a collective bargaining agreement; (2) ruled that § 11341(a) authorizes it to foreclose resort to RLA remedies for modification and enforcement of collective bargaining agreements, at least to the extent of its authority under § 11347 to impose labor-protective conditions on rail carrier consolidations; (3) remanded its decision to the parties for further negotiation or arbitration; and (4) predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of § 11341(a)—will not dismiss the case as moot, because (1) the Supreme Court's definitive interpretation of § 11341(a) may affect the ICC's remand order; (2) the ICC's compliance with the Court of Appeals' mandate does not affect the correctness of the Court of Appeals' decision; and (3) the alternative basis offered by the ICC for its remand order does not end the controversy between the parties, inasmuch as the parties retain an interest in the validity of the ICC's original order because the Court of Appeals may again disagree with the ICC's interpretation of § 11341(a) on review of the ICC's order on remand.

Administrative Law § 276 — judicial review — construction of statute

3. When reviewing a federal administrative agency's interpretation of a federal statute, the United States Supreme Court begins with the language of the statute and asks whether Congress has spoken on the subject before it; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Contracts § 87 — legal force

4. A contract has no legal force apart from the law that acknowledges its binding character.

SYLLABUS BY REPORTER OF DECISIONS

Once the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation under the conditions set forth in Chapter 113 of the Interstate Commerce Act (Act), 49 USC § 11301 et seq. [49 USCS §§ 11301 et seq.], a carrier in such a consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . . ," § 11341(a). In these cases, the ICC issued orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements. The Court of Appeals reversed and remanded, holding that § 11341(a) does not authorize the ICC to relieve a party of collectively bargained obligations that impede implementation of an approved transaction. Rea-

soning, inter alia, that the legislative history demonstrates a congressional intent that § 11341(a) apply to specific types of positive laws and not to common-law rules of liability, such as those governing contracts, the court declined to decide whether the section could operate to override provisions of the Railway Labor Act (RLA) governing the formation, construction, and enforcement of the collective-bargaining agreements at issue.

Held: The § 11341(a) exemption "from all other law" includes a carrier's legal obligations under a collective-bargaining agreement when necessary to carry out an ICC-approved transaction. The exemption's language, as correctly interpreted by the ICC, is clear, broad, and unqualified, bespeaking an unambiguous congressional intent to include any obstacle imposed by law. That language neither admits of a distinction between positive enactments and common-law liability rules nor supports the exclusion of contractual obligations. Thus, the exemption effects an override of such obligations by superseding the law—here, the RLA—which makes the contract binding. Cf. Schwabacher v United States, 334 US 182, 194-195, 200-201, 92 L Ed 1305, 68 S Ct 958. This determination makes sense of the Act's consolidation provisions, which were designed to promote economy and efficiency in interstate transportation by removing the burdens of excessive expenditure. Whereas § 11343(a)(1) requires the ICC to approve consolidations in the public interest, and § 11347 conditions such approval on satisfaction of certain labor-protective conditions, the § 11341(a) exemption guarantees that once employee interests are accounted for and the consolidation is approved, the RLA—whose major disputes resolution process is virtually interminable—will not prevent the efficiencies of consolidation from being achieved. Moreover, this reading will not, as the lower court feared, lead to bizarre results, since § 11341(a) does not exempt carriers from all law, but rather from all law *necessary* to carry out an *approved* transaction. Although it might be true that § 11341(a)'s scope is limited by § 11347, and that the breadth of the exemption is defined by the scope of the approved transaction, the conditions of approval and the standard for necessity are not at issue because the lower court did not pass on them and the parties do not challenge them here.

279 US App DC 239, 880 F2d 562, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Blackmun, O'Connor, Scalia, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined.

APPEARANCES OF COUNSEL

Jeffrey S. Berlin argued the cause for petitioners.

Jeffrey S. Minear argued the cause for federal respondents supporting petitioners.

William G. Mahoney argued the cause for private respondents.

Briefs of Counsel, p 747, infra.

[499 US 119]

Justice **Kennedy** delivered the opinion of the Court.

[1a] The Interstate Commerce Commission has the authority to approve rail carrier consolidations under certain conditions. 49 USC § 11301 et seq. [49 USCS §§ 11301 et seq.]. A carrier in an approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . . ." § 11341(a). These cases require us to decide whether the carrier's exemption under § 11341(a) "from all other law" extends to its legal obligations under a collective-bargaining agreement. We hold that it does.

I

A

"Prior to 1920, competition was the desideratum of our railroad economy." St. Joe Paper Co. v Atlantic Coast Line R. Co. 347 US 298, 315, 98 L Ed 710, 74 S Ct 574 (1954). Following a period of Government ownership during World War I, however, "many of the railroads were in very weak condition and their continued survival was in jeopardy." Id., at 315, 98 L Ed 710, 74 S Ct 574. At that time, the Nation made a commitment to railroad carrier consolidation as a means of promoting the health and efficiency of the railroad industry. Beginning with the Transportation Act of 1920, ch 91, 41 Stat 456, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." United States v Lowden, 308 US 225, 232, 84 L Ed 208, 60 S Ct 248 (1939). See generally St. Joe Paper Co. v Atlantic Coast Line R. Co., supra, at 315-321, 98 L Ed 710, 74 S Ct 574.

Chapter 113 of the Interstate Commerce Act, recodified in 1978 at 49 USC § 11301 et seq. [49 USCS §§ 11301 et seq.], contains the current statement of this national policy. The Act grants the Interstate Commerce Commission exclusive authority to examine, condition, and approve proposed mergers and consolidations of

[499 US 120]

transportation carriers within its jurisdiction. § 11343(a)(1). The Act requires the Commission to "approve and authorize" the transactions when they are "consistent with the public interest." § 11344(c). Among the factors the Commission must consider in making its public interest determination are "the interests of carrier employees affected by the proposed transaction." § 11344(b)(1) (D).[1] In authorizing a merger or consolidation, the Com-

1. Section § 11344(b)(1) provides:
"In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:
"(A) the effect of the proposed transaction on the adequacy of transportation to the public.
"(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.
"(C) the total fixed charges that result from the proposed transaction.
"(D) the interest of carrier employees affected by the proposed transaction.
"(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region."

mission "may impose conditions governing the transaction." § 11344(c). Once the Commission approves a transaction, a carrier is "exempt from the anti-trust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction." § 11341(a).

When a proposed merger involves rail carriers, the Act requires the Commission to impose labor-protective conditions on the transaction to safeguard the interests of adversely affected railroad employees. § 11347. In New York Dock Railway—Control—Brooklyn Eastern Dist. Terminal, 360 ICC 60, 84-90, aff'd sub nom. New York Dock Railway v United States, 609 F2d 83 (CA2 1979), the Commission announced a comprehensive set of conditions and procedures designed to meet its obligations under § 11347. Section 2 of the New York Dock conditions provides that the "rates of pay, rules, working conditions and all collective

[499 US 121]

bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements." 360 ICC, at 84. Section 4 sets forth negotiation and arbitration procedures for resolution of labor disputes arising from an approved railroad merger. Id., at 85. Under § 4, a merged or consolidated railroad which plans an operational change that may cause dismissal or displacement of any employee must provide the employee and his union 90 days' written notice. Ibid. If the carrier and union cannot agree on terms and conditions within 30 days, each party may submit the dispute for an expedited "final, binding and conclusive" determination by a neutral arbitrator. Ibid. Finally, the New York Dock conditions provide affected employees with up to six years of income protection, as well as reimbursements for moving costs and losses from the sale of a home. See id., at 86-89 (§§ 5-9, 12).

B

The two cases before us today involve separate ICC orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements.

1. In No. 89-1027, the Commission approved an application by NWS Enterprises, Inc., to acquire control of two previously separate rail carriers, petitioners Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern). See Norfolk Southern Corp.—Control—Norfolk & W.R. Co. and Southern R. Co. 366 ICC 173 (1982). In its order approving control, the Commission imposed the standard New York Dock labor-protective conditions and noted the possibility that "further displacement [of employees] may arise as additional coordinations occur." 366 ICC, at 230-231.

In September 1986, this possibility became a reality. The carriers notified the American Train Dispatchers' Association, the bargaining representative for certain N&W employees,

[499 US 122]

that they proposed to consolidate all "power distribution"—the assignment of locomotives to particular trains and facilities—for the N&W-Southern operation. To effect the efficiency move, the carriers informed the union that they would transfer work performed at the N&W power distribution center in Roanoke, Virginia, to the Southern

center in Atlanta, Georgia. The carriers proposed an implementing agreement in which affected N&W employees would be made management supervisors in Atlanta, and would receive increases in wages and benefits in addition to the relocation expenses and wage protections guaranteed by the New York Dock conditions. The union contended that this proposal involved a change in the existing collective-bargaining agreement that was subject to mandatory bargaining under the Railway Labor Act (RLA), 44 Stat 577, as amended, 45 USC § 151 et seq. [45 USCS §§ 151 et seq.]. The union also maintained that the carriers were required to preserve the affected employees' collective-bargaining rights, as well as their right to union representation under the RLA.

Pursuant to § 4 of the New York Dock procedures, the parties negotiated concerning the terms of the implementing agreement, but they failed to resolve their differences. As a result, the carriers invoked the New York Dock arbitration procedures. After a hearing, the arbitration committee ruled in the carriers' favor. The committee noted that the transfer of work to Atlanta was an incident of the control transaction approved by the ICC, and that it formed part of the "additional coordinations" the ICC predicted would be necessary to achieve "greater efficiencies." The committee also held it had the authority to abrogate the provisions of the collective-bargaining agreement and of the RLA as necessary to implement the merger. Finally, it held that because the application of the N&W bargaining agreement would impede the transfer, the transferred employees did not retain their collective-bargaining rights.

[499 US 123]

The union appealed to the Commission, which affirmed by a divided vote. It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and [Railway Labor Act] provisions must give way to the Commission-mandated procedures of section 4 [of the New York Dock conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." App to Pet for Cert in No. 89-1027, p 33a. Accordingly, the Commission upheld the arbitration committee's determination that the "compulsory, binding arbitration required by Article I, section 4 of New York Dock, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." Id., at 35a. The Commission also held that because the work transfer was incident to the approved merger, it was "immunized from conflicting laws by section 11341(a)." Ibid. Noting that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function," the Commission upheld the decision to override the collective-bargaining agreement and RLA provisions. Id., at 37a.

2. In No. 89-1028, the Commission approved an application by CSX Corporation to acquire control of the Chessie System, Inc., and Seaborad Coastline Industries, Inc. CSX Corp. —Control—Chessie System, Inc., and Seaboard Coastline Industries, Inc.

363 ICC 521 (1980). Chessie was the parent of the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railway Company; Seaboard was the parent of the Seaboard Coast Line Railroad Company. In approving the control acquisition, the Commission imposed the New York Dock conditions and recognized that "additional coordinations may occur that could lead to further employee displacements." 363 ICC, at 589.

[499 US 124]

In August 1986, the consolidated carrier notified respondent Brotherhood of Railway Carmen that it planned to close Seaboard's heavy freight car repair shop at Waycross, Georgia, and transfer the Waycross employees to Chessie's similar shop in Raceland, Kentucky. The carrier informed the Brotherhood that the proposed transfer would result in a net decrease of jobs at the two shops. Pursuant to New York Dock, the carrier and the union negotiated concerning the terms of an agreement to implement the transfer. The sticking point in the negotiations involved a 1966 collective-bargaining agreement between the union and Seaboard known as the "Orange Book." The Orange Book provided that the carrier would employ each covered employee and maintain each employee's work conditions and benefits for the remainder of the employee's working life. The Brotherhood contended that the Orange Book prevented CSX from moving work or covered employees from Waycross to Raceland.

When negotiations broke down, both the union and the carrier invoked the arbitration procedures under § 4 of New York Dock. The arbitration committee ruled for the carrier. It agreed with the union that the Orange Book prohibited the proposed transfer of work and employees. It determined, however, that it could override any Orange Book or RLA provision that impeded an operational change authorized or required by the ICC's decision approving the original merger. The committee then held that the carrier could transfer the heavy repair work, which it found necessary to the original control acquisition, but could not transfer employees protected by the Orange Book, which it found would only slightly impair the original control acquisition. Both parties appealed the award to the Commission.

A divided Commission affirmed in part and reversed in part. The Commission agreed the committee possessed authority to override collective-bargaining rights and RLA rights that prevent implementation of a proposed transaction.

[499 US 125]

It reasoned, however, that "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. 4 ICC 2d 641, 650 (1988). The Commission thus affirmed the arbitration committee's order permitting the transfer of work but reversed the holding that the carriers could not transfer Orange Book employees.

3. The unions appealed both cases to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals considered the cases together and reversed and remanded to the Commission. Brotherhood of Railway Carmen v ICC, 279 US App DC 239, 880 F2d 562 (1989). The court held that § 11341(a) does not authorize the Commission to relieve a party of collective-bar-

gaining agreement obligations that impede implementation of an approved transaction. The court stated various grounds for its conclusion. First, because the court did not read the phrase "all other law" in § 11341(a) to include "all legal obstacles," it found "no support in the language of the statute" to apply the statute to obligations imposed by collective-bargaining agreements. Id., at 244, 880 F2d, at 567. Second, the court analyzed the Transportation Act of 1920, ch 91, § 407, 41 Stat 482, which contained a predecessor to § 11341(a), and found that Congress "did not intend, when it enacted the immunity provision, to override contracts." 279 US App DC, at 247, 880 F2d, at 570. The court noted that Congress had "focused nearly exclusively . . . on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract." Ibid. The court further noted that Congress had often revisited the immunity provision without making it clear that it included contracts or collective-bargaining agreements. Ibid. Finally, the court did not defer to the ICC's interpretation of the Act, presumably because it determined that the Commission's interpretation was belied by the contrary "'unambiguously

[499 US 126]

expressed intent of Congress,'" id., at 244, 880 F2d, at 567 (quoting Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc. 467 US 837, 843, 81 L Ed 2d 694, 104 S Ct 2778 (1984)).

In ruling that § 11341(a) did not apply to collective-bargaining agreements, the court "decline[d] to address the question" whether the section could operate to override provisions of the RLA. Brotherhood of Railway Carmen, supra, at 247-250, 880 F2d, at 570-573. It also declined to consider whether the labor protective conditions required by § 11347 are exclusive, or whether § 4 of the New York Dock conditions gives an arbitration committee the right to override provisions of a collective-bargaining agreement. 279 US App DC, at 250, 880 F2d, at 573. The court remanded the case to the Commission for a determination on these issues.

After the Court of Appeals denied the carriers' petitions for rehearing, the carriers in the consolidated cases filed petitions for certiorari, which we granted on March 26, 1990. 494 US 1055, 108 L Ed 2d 762, 110 S Ct 1522 (1990).[2] We now reverse.

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2. On September 9, 1989, the Commission also filed a petition for rehearing, and requested the court to refrain from ruling on the petition until the Commission could issue a comprehensive decision on remand addressing issues that the Court of Appeals left open for resolution. On September 29, 1989, the Court of Appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand." App to Pet for Cert in No. 89-1027, p 54a.

On January 4, 1990, the Commission reopened proceedings in the case remanded to it. On May 21, 1990, two months after we granted the carriers' petitions for certiorari, the Commission issued its remand decision. CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. 6 ICC 2d 715 (1990). In its decision, the Commission adhered to the Court of Appeals' ruling that § 11341(a) did not authorize it to override provisions of a collective-bargaining agreement. The Commission held, however, that § 11341(a) authorized it to foreclose resort to RLA remedies for modification and enforcement of collective-bargaining agreements "at least to the extent of [its] authority" to impose labor-protective conditions under § 11347. Id., at 754. The Commission explained that the § 11347 limit on its § 11341(a) authority "reflects the consistency of the overall statutory scheme for dealing with CBA modifications required to imple-

[499 US 127]

II

[1b] Title 49 USC § 11341(a) [49 USCS § 11341(a)] provides:

> ". . . A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . ."

We address the narrow question whether the exemption in § 11341(a) from "all other law" includes a carrier's legal obligations under a collective-bargaining agreement.

[1c, 2a] By its terms, the exemption applies only when *necessary* to carry out an *approved* transaction. These predicates, however, are not at issue here, for the Court of Appeals did not pass on them and the parties do not challenge them. For purposes of this decision, we assume, without deciding, that the Commission properly considered the public interest factors of § 11344(b)(1) in approving the original transaction, that its decision to override the carriers' obligations is consistent with the labor protective requirements of § 11347, and that the override was necessary to the implementation of the transaction within the meaning of § 11341(a). Under these

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assumptions, we hold that the exemption from "all other law" in § 11341(a) includes the obligations imposed by the terms of a collective-bargaining agreement.[3]

[1d, 3] As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 US, at 842-

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ment Commission-approved mergers and consolidations." Id., at 722. The Commission remanded its decision to the parties for further negotiation or arbitration.

On December 4, 1990, the union respondents petitioned the Court of Appeals for review of the Commission's remand decision. The petition raises three issues: (1) whether § 11341(a) authorizes the ICC to foreclose employee resort to the RLA; (2) whether § 11347 authorizes the ICC to compel employees to arbitrate changes in collective-bargaining agreements; and (3) whether abrogation of employee contract rights effected a taking in violation of the Due Process and Just Compensation Clauses of the Fifth Amendment.

3. **[2b]** On May 23, 1990, and again on September 19, 1990, the union respondents filed motions to dismiss the case as moot. They argued that in light of the alternative ground for decision offered by the ICC on remand from the Court of Appeals, see n 2, supra, the meaning and scope of § 11341(a) was no longer material to the dispute. The union respondents reassert their mootness argument in their brief on the merits. Brief for Respondent Unions 18.

We disagree. The Commission predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of § 11341(a). Thus, our definitive interpretation of § 11341(a) may affect the Commission's remand order. Agency compliance with the Court of Appeals' mandate does not moot the issue of the correctness of the court's decision. See, e.g., Cornelius v NAACP Legal Defense & Educational Fund, Inc., 473 US 788, 791, n 1, 87 L Ed 2d 567, 105 S Ct 3439 (1985); Schweiker v Gray Panthers, 453 US 34, 42, n 12, 69 L Ed 2d 460, 101 S Ct 2633 (1981); Maher v Roe, 432 US 464, 468-469, n 4, 53 L Ed 2d 484, 97 S Ct 2376 (1977). In addition, the alternative basis offered by the Commission on remand does not end the controversy between the parties. The parties retain an interest in the validity of the ICC's original order because the Court of Appeals may again disagree with the Commission's interpretation of the Act in its review of the remand order.

843, 81 L Ed 2d 694, 104 S Ct 2778. The contested language in § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of legislative history, between positive enactments and common-law rules of liability. Nor does it support the Court of Appeals' conclusion that Congress did not intend the immunity clause to apply to contractual obligations.

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[1e] By itself, the phrase "all other law" indicates no limitation. The circumstance that the phrase "all other law" is in addition to coverage for "the antitrust laws" does not detract from this breadth. There is a canon of statutory construction which, on first impression, might seem to dictate a different result. Under the principle of ejusdem generis, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration. See Arcadia v Ohio Power Co. 498 US 73, 84-85, 112 L Ed 2d 374, 111 S Ct 415 (1990). The canon does not control, however, when the whole context dictates a different conclusion. Here, there are several reasons the immunity provision cannot be interpreted to apply only to antitrust laws and similar statutes. First, because "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored," United States v Philadelphia Nat. Bank, 374 US 321, 350, 10 L Ed 2d 915, 83 S Ct 1715 (1963), Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of § 11341(a). Second, the otherwise general term "all other law" "includ[es]" (but is not limited to) "State and municipal law." This shows that "all other law" refers to more than laws related to antitrust. Also, the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the word "all," that the phrase "all other law" includes federal law other than the antitrust laws. In short, the immunity provision in § 11341 means what it says: A carrier is exempt from *all law* as necessary to carry out an ICC-approved transaction.

[1f, 4] The exemption is broad enough to include laws that govern the obligations imposed by contract. "The obligation of a contract is 'the law which binds the parties to perform their agreement.'" Home Building & Loan Assn. v Blaisdell, 290 US 398, 429, 78 L Ed 413, 54 S Ct 231 (1934) (quoting Sturges v Crowninshield, 4 Wheat 122, 197, 4 L Ed 529 (1819)). A contract depends on a regime

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of common and statutory law for its effectiveness and enforcement.

> "Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." Farmers and Merchants Bank of Monroe v Federal Reserve Bank of Richmond, 262 US 649, 660, 67 L Ed 1157, 43 S Ct 651, 30 ALR 635 (1923).

A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption in § 11341(a) from "all other law" effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.

Schwabacher v United States, 334 US 182, 92 L Ed 1305, 68 S Ct 958 (1948), which construed the immediate precursor of § 11341(a), § 5(11) of the Transportation Act of 1940, ch 722, § 7, 54 Stat 908-909,[4] supports this conclusion. In Schwabacher, minority stockholders in a carrier involved in an ICC-approved merger complained that the terms of the merger diminished the value of their shares as guaranteed by the corporate charter

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and thus "deprived [them] of contract rights under Michigan law . . . ." 334 US, at 188, 92 L Ed 1305, 68 S Ct 958. We explained that the Commission was charged under the Act with passing upon and approving all capital liabilities assumed or discharged by the merged company, and that once the Commission approved a merger in the public interest and on just and reasonable terms, the immunity provision relieved the parties to the merger of "restraints, limitations, and prohibitions of law, Federal, State, or municipal," as necessary to carry out the transaction. Id., at 194-195, 198, 92 L Ed 1305, 68 S Ct 958. We noted that before approving the merger, the Commission had a duty "to see that minority interests are protected," and emphasized that any such minority rights were, "as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." Id., at 201, 92 L Ed 1305, 68 S Ct 958. Once these interests were accounted for, however, "[i]t would be inconsistent to allow state law to apply a liquidation basis [for valuation] to what federal law designates as a basis for continued public service." Id., at 200, 92 L Ed 1305, 68 S Ct 958. Relying in part on the immunity provision, we held the contract rights protected by state law did not survive the merger agreement found by the Commission to be in the public interest. Id., at 194-195, 200-201, 92 L Ed 1305, 68 S Ct 958. Because the Commission had disclaimed jurisdiction to settle the shareholders' complaints, we remanded the case to the Commission to ensure that the terms of the merger were just and reasonable. Id., at 202, 92 L Ed 1305, 68 S Ct 958.

Just as the obligations imposed by state contract law did not survive the merger at issue in Schwabacher, the obligations imposed by the law that gives force to the carriers' collective-bargaining agreements, the

4. Section 5(11) of the Transportation Act of 1940 provided:

"[A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ."

The recodification of this language in § 11341(a) effected no substantive change. See HR Rep No. 95-1395, pp 158-160 (1978). See also ICC v Locomotive Engineers, 482 US 270, 299, n 12, 96 L Ed 2d 222, 107 S Ct 2360 (1987) (Stevens, J., concurring in judgment).

RLA, do not survive the merger in this case. The RLA governs the formation, construction, and enforcement of the labor-management contracts in issue here. It requires carriers and employees to make reasonable efforts "to make and maintain" collective-bargaining agreements, 45 USC § 152 First [45 USCS § 152 First], and to refrain from making changes in existing agreements except in

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accordance with RLA procedures, 45 USC §§ 152 Seventh, 156 [45 USCS §§ 152 Seventh, 156]. The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements." Slocum v Delaware, L. & W. R. Co. 339 US 239, 242, 94 L Ed 795, 70 S Ct 577 (1950). As the law which gives "legal and binding effect to collective agreements," Detroit & T. S. L. R. Co. v United Transportation Union, 396 US 142, 156, 24 L Ed 2d 325, 90 S Ct 294 (1969), the RLA is the law that, under § 11341(a), is superseded when an ICC-approved transaction requires abrogation of collective-bargaining obligations. See ICC v Locomotive Engineers, 482 US 270, 287, 96 L Ed 2d 222, 107 S Ct 2360 (1987) (Stevens, J., concurring in judgment); Brotherhood of Locomotive Engineers v Boston & Maine Corp. 788 F2d 794, 801 (CA1 1986); Missouri Pacific R. Co. v United Transportation Union, 782 F2d 107, 111 (CA8 1986); Burlington Northern, Inc. v American Railway Supervisors Assn. 503 F2d 58, 62-63 (CA7 1974); Bundy v Penn Central Co. 455 F2d 277, 279-280 (CA6 1972); Nemitz v Norfolk & Western R. Co., 436 F2d 841, 845 (CA6), aff'd, 404 US 37, 30 L Ed 2d 198, 92 S Ct 185 (1971); Brotherhood of Locomotive Engineers v Chicago & N. W. R. Co. 314 F2d 424 (CA8 1963); Texas & N. O. R. Co. v Brotherhood of Railroad Trainmen, 307 F2d 151, 161-162 (CA5 1962); Railway Labor Executives Assn. v Guilford Transp. Industries, Inc. 667 F Supp 29, 35 (Me 1987), aff'd, 843 F2d 1383 (CA1 1988).

Our determination that § 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC-approved transaction makes sense of the consolidation provisions of the Act, which were designed to promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." Texas v United States, 292 US 522, 534-535, 78 L Ed 1402, 54 S Ct 819 (1934). The Act requires the Commission to approve consolidations in the public interest. 49 USC § 11343(a)(1) [49 USCS § 11343(a)(1)]. Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to

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transferred employees" as well as "the loss of seniority rights," United States v Lowden, 308 US 225, 233, 84 L Ed 208, 60 S Ct 248 (1939), the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. 49 USC §§ 11344(b)(1)(D), 11347 [49 USCS §§ 11344(b)(1)(D), 11347]; see also New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 ICC 60 (1979). Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If § 11341(a) did not apply to bargain-

ing agreements enforceable under the RLA, rail carrier consolidations would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. See, e.g. Burlington Northern R. Co. v Maintenance of Way Employes, 481 US 429, 444, 95 L Ed 2d 381, 107 S Ct 1841 (1987) (resolution procedures for major disputes "virtually endless"); Detroit & T. S. L. R. Co. v United Transportation Union, 396 US 142, 149, 24 L Ed 2d 325, 90 S Ct 294 (1969) (dispute resolution under RLA involves "an almost interminable process"); Railway Clerks v Florida East Coast R. Co. 384 US 238, 246, 16 L Ed 2d 501, 86 S Ct 1420 (1966) (RLA procedures are "purposely long and drawn out"). The immunity provision of § 11341(a) is designed to avoid this result.

We hold that, as necessary to carry out a transaction approved by the Commission, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers. We affirm the Commission's interpretation of § 11341(a), not out of deference in the face of an

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ambiguous statute, but rather because the Commission's interpretation is the correct one.

This reading of § 11341(a) will not, as the Court of Appeals feared, lead to bizarre results. Brotherhood of Railway Carmen v ICC, 279 US App DC, at 244, 880 F2d, at 567. The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the Commission held on remand from the Court of Appeals, that the scope of the immunity provision is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions. See n 2, supra. It also might be true that "[t]he breadth of the exemption [in § 11341(a)] is defined by the scope of the approved transaction . . ." ICC v Locomotive Engineers, supra, at 298, 96 L Ed 2d 222, 107 S Ct 2360 (Stevens, J., concurring in judgment). We express no view on these matters, as they are not before us here.

The judgment of the Court of Appeals is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice **Stevens**, with whom Justice **Marshall** joins, dissenting.

The statutory exemption that the Court construes today had its source in § 407 of the Transportation Act of 1920 (1920 Act). 41 Stat 482. Its wording was slightly changed in 1940, 54 Stat 908-909, and again in 1978, 92 Stat 1434. There is, however, no claim that either of those amendments modified the coverage

of the exemption in any way. It is therefore appropriate to begin with a consideration of the purpose and the text of the 1920 Act.

[499 US 135]

Before the First World War, the railroad industry had been the prime target of antitrust enforcement.[1] In 1920, however, Congress adopted a new national transportation policy that expressly favored the consolidation of railroads. The policy of consolidation embodied in the 1920 Act would obviously have been frustrated by the federal antitrust laws had Congress not chosen to exempt explicitly all approved mergers from these laws. Section 407 of that Act provided, in part:

> "The carriers affected by any order made under the foregoing provisions of this section . . . shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' . . . and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." 41 Stat 482.

Both the background and the text of § 407 make it absolutely clear that its primary focus was on federal antitrust laws. Sensibly, however, Congress wrote that section using language broad enough to cover any other federal or state law that might otherwise forbid the consummation of any approved merger or prevent the immediate operation of its properties under a new corporate owner. Not a word in the statute, or in its legislative history, contains any hint that the approval of a merger by the Interstate Commerce Commission (ICC) would impair the obligations of valid and otherwise enforceable private contracts.

Given the present plight of our Nation's railroads, it may be wise policy to give the ICC a power akin to, albeit greater

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than, that of a bankruptcy court to approve a trustee's rejection of a debtor's executory private contracts.[2] Through nothing short of a tour de force, however, can one find any such power in 49 USC § 11341 [49 USCS § 11341], or in either of its predecessors. Obviously, consolidated carriers would find it useful to have the ability to disavow disadvantageous long-term leases on obsolete car repair facilities, employment contracts with high salaried executives whose services are no longer needed, as well as collective-bargaining agreements that provide costly job security to a shrinking work force. If Congress had intended to give the ICC such broad ranging power to impair contracts, it would have done so in language much clearer than anything that can be found in the present Act.

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1. See United States v Trans-Missouri Freight Assn. 166 US 290, 41 L Ed 1007, 17 S Ct 540 (1897); United States v Joint Traffic Assn. 171 US 505, 43 L Ed 259, 19 S Ct 25 (1898); Northern Securities Co. v United States, 193 US 197, 48 L Ed 679, 24 S Ct 436 (1904); United States v Terminal Railroad Assn. of St. Louis, 224 US 383, 56 L Ed 810, 32 S Ct 507 (1912); United States v Union Pacific R. Co. 226 US 61, 57 L Ed 124, 33 S Ct 53 (1912); United States v Pacific & Arctic R. & Nav. Co. 228 US 87, 57 L Ed 742, 33 S Ct 443 (1913).

2. Section 365 of the Bankruptcy Code, 11 USC § 365 [11 USCS § 365], allows a trustee to assume or reject a debtor's executory contracts and unexpired leases subject to the *subsequent* approval of the bankruptcy court. Collective-bargaining agreements can be rejected only if the additional requirements of 11 USC § 1113 [11 USCS § 1113] are met.

The Court's contrary conclusion rests on its reading of the "plain meaning" of the present statutory text and our decision in Schwabacher v United States, 334 US 182, 92 L Ed 1305, 68 S Ct 958 (1948). Neither of these reasons is sufficient. Moreover, the Court's reading is inconsistent with other unambiguous provisions in the statute.

I

With or without the ejusdem generis canon, I believe that the normal reader would assume that the text of § 11341 encompasses the antitrust laws, as well as other federal or state laws, that would otherwise prohibit rail carriers from consummating approved mergers, and nothing more. See ante, at 128, 113 L Ed 2d, at 106-107. That text contains no suggestion that whenever a criminal law, tort law, or any regulatory measure impedes the efficient operation of a new merged carrier, the carrier can avoid such a restriction by virtue of the ICC approval of that merger. Nor does the text of § 11341 contain any suggestion

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that such an approval would impair the obligation of private contracts.[3] Rather, as both an application of the ejusdem generis canon and an examination of the legislative history show, the purpose of the exemption was to relieve the carriers "from the operation of the antitrust *and other restrictive or prohibitory laws.*" HR Conf Rep No. 650, 66th Cong, 2d Sess, 64 (1920) (emphasis added).

The Court speculates that the reason the 1920 Congress explicitly referred to the antitrust laws was simply to avoid the force of the rule that repeals of the antitrust laws by implication are not favored, citing United States v Philadelphia Nat. Bank, 374 US 321, 350, 10 L Ed 2d 915, 83 S Ct 1715 (1963). In that case, however, the rule was announced in the context of the industry's argument that federal regulatory approval of a transaction exempted the transaction from the antitrust laws even though the regulatory statute was entirely silent on the subject of exemption. Ibid. The authority cited in the Philadelphia

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decision to support this rule sheds no light on the question whether a statute creating a broad exemption for mergers would naturally be read to include all statutes that otherwise would have prohibited the consum-

3. As Judge D. H. Ginsburg, writing for the Court of Appeals, noted:

"We cannot sustain the ICC's position that this provision empowers it to override a [collective-bargaining agreement (CBA)]. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from 'the antitrust laws and from all other law' to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to CBAs. Nor has the ICC explained how we can read the term 'other law,' as it has done, to mean 'all legal obstacles.' Dispatchers, J A 207. None of the Supreme Court decisions, discussed below, authorizing the ICC to abrogate an 'other law' even suggests that the term means 'all legal obstacles.' The ICC itself, prior to its 1983 decision in DRGW, recognized as much. See Gulf, Mobile & Ohio R. R. Co.—Abandonment, 282 ICC 311, 335 (1952) ('None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.')." Brotherhood of Railway Carmen v ICC, 279 US App DC 239, 244, 880 F2d 562, 567 (1989).

mation of a merger of large rail carriers.[4]

Of greater importance, however, is the Court's rather remarkable assumption that an exemption "from 'all other

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law' " should be read to encompass the restraints created by private contract.[5] Ante, at 129-130, 113 L Ed 2d, at 107-108. Even if the text of the present Act could bear that reading, it is flatly inconsistent with the text of the 1920 Act, which relieved the participating carriers "from the operation of the 'antitrust laws' . . . and of all other restraints or prohibitions by law, State or federal . . . ." 41 Stat 482. Moreover, given the respect that our legal system has always paid to the enforceability of private contracts—a respect that is evidenced by express language in the

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4. All but two of the cases that the Court cited in the Philadelphia decision to support the rule against implicit repeals of the antitrust statutes arose under a regulatory framework in which there was no mention of exemption. United States v Philadelphia Nat. Bank, 374 US 321, 350, n 28, 10 L Ed 2d 915, 83 S Ct 1715 (1963). See United States v Trans-Missouri Freight Assn. 166 US, at 314-315, 41 L Ed 1007, 17 S Ct 540; United States v Joint Traffic Assn. 171 US 505, 43 L Ed 259, 19 S Ct 25 (1898); Northern Securities Co. v United States, 193 US, at 343, 374-376, 48 L Ed 679, 24 S Ct 436 (plurality and dissenting opinions); United States v Pacific & Arctic R. & Nav. Co., 228 US, at 105, 107, 57 L Ed 742, 33 S Ct 443; Keogh v Chicago & Northwestern R. Co. 260 US 156, 161-162, 67 L Ed 183, 43 S Ct 47 (1922); Central Transfer Co. v Terminal Railway Assn. of St. Louis, 288 US 469, 474-475, 77 L Ed 899, 53 S Ct 444 (1933); Terminal Warehouse Co. v Pennsylvania R. Co. 297 US 500, 513-515, 80 L Ed 827, 56 S Ct 546 (1936); United States v Borden Co. 308 US 188, 197-206, 84 L Ed 181, 60 S Ct 182 (1939); United States v Socony-Vacuum Oil Co. 310 US 150, 226-228, 84 L Ed 1129, 60 S Ct 811 (1940); Georgia v Pennsylvania R. Co. 324 US 439, 456-457, 89 L Ed 1051, 65 S Ct 716 (1945); United States Alkali Export Assn., Inc. v United States, 325 US 196, 205-206, 89 L Ed 1554, 65 S Ct 1120 (1945); Allen Bradley Co. v Electrical Workers, 325 US 797, 809-810, 89 L Ed 1939, 65 S Ct 1533 (1945); Northern Pacific R. Co. v United States, 356 US 1, 9, 2 L Ed 2d 545, 78 S Ct 514 (1958); United States v Radio Corp. of America, 358 US 334, 3 L Ed 2d 354, 79 S Ct 457 (1959); California v FPC, 369 US 482, 8 L Ed 2d 54, 82 S Ct 901 (1962); Silver v New York Stock Exchange, 373 US 341, 10 L Ed 2d 389, 83 S Ct 1246 (1963). The other two cases involve regulations with explicit exemptions from the antitrust laws, but do not support the position taken by the Court in this case. In Maryland & Virginia Milk Producers Assn., Inc. v United States, 362 US 458, 4 L Ed 2d 880, 80 S Ct 847 (1960), this Court held that § 6 of the Clayton Act's exemption of agricultural cooperatives from the antitrust law only protected the formation of those associations; once formed they could not engage in any further conduct that would violate the antitrust laws. In Pan American World Airways, Inc. v United States, 371 US 296, 9 L Ed 2d 325, 83 S Ct 476 (1963), the Court held that the exemption relieving airlines from the operation of the antitrust laws when certain transactions were approved by the Civil Aeronautics Board did not exempt the airlines from all antitrust violations, but only exempted them from violations stemming from activity explicitly governed by the regulatory scheme.

5. Again Judge Ginsburg's observation is pertinent:

"Moreover, the ICC's proposed insertion of 'all legal obstacles' into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. Cf. Gulf, Mobile & Ohio, 282 ICC at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its 'contractual obligations for the payment of rent'). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act." 279 US App DC, at 244-245, 880 F2d, at 567-568.

Constitution itself[6]—there should be a powerful presumption against finding an implied authority to impair contracts in a statute that was enacted to alleviate a legitimate concern about the antitrust laws. Had Congress intended to convey the message the Court finds in § 11341, it surely would have said expressly that the exemption was from all restraints imposed by law or by private contract.[7]

[499 US 140]

II

In my opinion, the Court's reliance on the decision in Schwabacher v United States, 334 US 182, 92 L Ed 1305, 68 S Ct 958 (1948), is misplaced. In that case, the owners of two percent of the outstanding preferred stock of the Pere Marquette Railway brought suit in the United States District Court to set aside an ICC order approving a merger between that corporation and the Chesapeake and Ohio Railway Corporation. In approving the merger, the ICC had found that the market value of plaintiffs' preferred shares ranged, at different times, from $87 to $99 per share, and that the stock that they received in exchange pursuant to the merger agreement would have realized about $90 and $111 on the same dates. Thus, the terms of the merger, as applied to the plaintiffs' class, were just and reasonable. Plaintiffs contended, however, that the exchange value of their shares amounted to $172.50 per share because the merger was a "liquidation" as a matter of Michigan law, and the Pere Marquette Charter provided that in the event of liquidation or dissolution, the preferred shareholders were entitled to receive full payment of par value plus all accrued unpaid dividends.

The ICC order approving the merger did not resolve the Michigan law question. The ICC considered the issue too insignificant to affect the validity of the entire transaction, and left the matter for resolution by negotiation or later litigation. On appeal from the District Court's judgment sustaining the ICC order, this Court held that the ICC's finding that the exchange value was just and reasonable foreclosed any other claim that the dissenting shareholders might assert

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concerning the value of their shares. Whatever Michigan law might provide for the preferred shareholders in the event of a winding-up or liquidation could not determine the just and reasonable value of shares in the continuing enterprise. The essence of the Court's holding is set forth in this passage:

"Since the federal law clearly contemplates merger as a step in

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6. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." US Const, Art I, § 10, cl 1.

7. After reviewing the legislative history, Judge Ginsburg concluded:

"From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract. Cf. Association of Flight Attendants v Delta Air Lines, Inc., 879 F2d 906, 917 (DC Cir 1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties." 279 US App DC, at 247, 880 F2d, at 570.

continuing the enterprise, it follows that what Michigan law might give these dissenters on a winding-up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service. . . .

. . . . . .

"We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." Id., at 200-201, 92 L Ed 1305, 68 S Ct 958.

It is true that the effect of the Schwabacher decision was to extinguish whatever contractual rights the dissenting shareholders possessed as a matter of Michigan law. But the Court did require the ICC, on remand, to consider whatever value the Michigan law claims might have in connection with its final conclusion that the merger plan was "just and reasonable." A fair reading of the entire opinion makes it clear that the holding was based more on the ICC's "complete control of the capital structure to result from a merger," id., at 195, 92 L Ed 1305, 68 S Ct 958, than on the exemption at issue in this case. Schwabacher cannot fairly be read as authorizing carriers to renounce private contracts that limit the benefits achievable through the merger.

[499 US 142]

III

There is tension between the Court's interpretation of the exemption that is now codified in 49 USC § 11341(a) [49 USCS § 11341(a)] and the labor-protection conditions set forth in 49 USC § 11347 [49 USCS § 11347]. The latter section requires an ICC order approving a railroad merger to impose conditions that are "no less protective" of the employees than those established pursuant to the Rail Passenger Service Act, 84 Stat 1337, as amended, 45 USC § 565 [45 USCS § 565]. One of the conditions established by the Secretary of Labor under the latter Act was essentially the same as § 2 of the New York Dock conditions described by the Court, ante, at 120-121, 113 L Ed 2d, at 102. As the Court notes, that condition provides that the benefits protected " 'under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements.' " Id., at 121, 113 L Ed 2d, at 102 (citation omitted). This provision unambiguously indicates that Congress intended and expected that collective-bargaining agreements would survive any ICC approved merger.

As I noted in my separate opinion in ICC v Locomotive Engineers, 482 US 270, 298, 96 L Ed 2d 222, 107 S Ct 2360 (1987), the statutory immunity provision in § 11341 is self-executing and becomes effective at the time of the ICC approval. "The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable." Ibid.

(footnote omitted). In neither of the cases before the Court today did the ICC approval of the merger purport to modify or terminate any collective-bargaining agreement. The ICC approval orders were entered in 1980 and 1982 and contained no mention of either of the proposed transfers of personnel that are now at issue and about which the union was first notified several years after the ICC orders were entered.[8]

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I cannot subscribe to a late-blooming interpretation of 71-year-old immunity statute that gives the Commission a roving power—exercisable years after a merger has been approved and consummated—to impair the obligations of private contracts that may "prevent the efficiencies of consolidation from being achieved." Ante, at 133, 113 L Ed 2d, at 109. The Court's decision may represent a "better" policy choice than the one Congress actually made in 1920, cf. West Virginia University Hospitals, Inc. v Casey, ante, at 100-101, 113 L Ed 2d 68, 111 S Ct 1138 (1991), but it is neither an accurate reading of the command that Congress issued in 1920, nor is it a just disposition of claims based on valid private contracts.

I respectfully dissent.

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8. In the ICC order approving the merger of Chessie System, Inc., and Seaboard Coastline Industries, Inc., the ICC discussed how the coordination of facilities would generate significant cost reductions and improved economic efficiency. CSX Corp.—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc. 363 ICC 521, 556 (1980). The ICC noted:

"These savings will spring from common-point coordination projects, mechanical and engineering department coordinations, locomotive and car utilization improvements, and internal rerouting efficiencies. Each of these projects is discussed separately below." Ibid.

In the discussion that followed, the ICC did discuss plans to expand the car production facilities at Raceland, Kentucky, in order to make cars for a member line that had been buying its cars from an independent manufacturer. The ICC found that the applicants had failed to show that the public would derive any benefit from this plan. There was no discussion of the consolidation of that facility by closing Seaboard's car repair shop in Waycross, Georgia. Nor did the ICC discuss the consolidation of locomotive works in Norfolk Southern Corp.—Control—Norfolk & W. R. Co. and Southern R. Co. 366 ICC 173 (1982).

[499 US 144]

LYNN MARTIN, Secretary of Labor, Petitioner

v

OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION et al.

499 US 144, 113 L Ed 2d 117, 111 S Ct 1171

[No. 89-1541]

Argued November 27, 1990. Decided March 20, 1991.

Decision: With respect to ambiguous Occupational Safety and Health Act regulation, reviewing court held required to defer to reasonable interpretation of Secretary of Labor rather than that of OSHRC.

SUMMARY

A regulation (29 CFR § 1910.1029) promulgated by the United States Secretary of Labor, pursuant to the Secretary's authority under the Occupational Safety and Health Act of 1970 (OSH Act) (29 USCS §§ 651 et seq.), set forth standards which (1) governed employee exposure to coke-oven emissions; (2) established the maximum permissible emission levels; and (3) required the use of employee respirators in certain circumstances. An investigation by one of the Secretary's compliance officers revealed that (1) an employer had equipped some of its employees with respirators that had failed an "atmospheric test" designed to determine whether a respirator provided a sufficiently tight fit, and (2) as a result, the employees were exposed to coke-oven emissions which exceeded the regulatory limit. The compliance officer issued a citation to the employer and assessed a penalty of $10,000 for violating 29 CFR § 1910.1029(g)(3), which required employers to "institute a respiratory protection program in accordance with" another regulation (29 CFR § 1910.134) that delineated the employee instruction and training procedures necessary for "safe use of any respirator." The employer contested the citation before an administrative law judge (ALJ) appointed by the Occupational Safety and Health Review Commission—a three-member board appointed by the President with the advice and consent of the Senate and assigned by the OSH Act to "carr[y] out adjudicatory functions" —but the ALJ affirmed the citation. Subsequently, however, the full Commission, granting the employer's petition for review of the ALJ's order and vacating the citation, concluded that the employer's obligation was instead

Briefs of Counsel, p 749, infra.

stated in 29 CFR § 1910.1029(g)(4)(i), which required only that the respirator exhibit "minimum facepiece leakage" and be "fitted properly." On petition for review, the United States Court of Appeals for the Tenth Circuit, affirming the order of the full Commission, expressed the view that (1) since the relevant regulations were ambiguous as to the employer's obligation to assure proper fit of an employee's respirator, the issue was whose reasonable interpretation of the regulations—the Secretary's or the Commission's —merited the court's deference, and (2) the Commission's interpretation (a) was reasonable, and (b) was entitled to deference under the circumstances, on the ground that the Commission's adjudicative function necessarily encompassed the power to declare the law (891 F2d 1495).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by MARSHALL, J., expressing the unanimous view of the court, it was held that (1) where the Secretary of Labor and the Commission furnished reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary under the OSH Act, a reviewing court should defer to the Secretary's interpretation, because (a) the power to render authoritative interpretations of OSH Act regulations was a necessary adjunct of the Secretary's powers under the OSH Act to promulgate and to enforce national workplace health and safety standards, (b) as promulgator, the Secretary was in a better position than was the Commission to reconstruct the purpose of OSH Act regulations, (c) as enforcer, the Secretary came into contact with a much greater number of regulatory problems than did the Commission, with the result that the Secretary was more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation, (d) it was presumed that Congress intended to invest interpretive power in the administrative actor in the best position to develop historical familiarity and policymaking expertise, and (e) the legislative history of the OSH Act supported such a conclusion; and (2) the Supreme Court would leave for resolution on remand the issue whether the Secretary had reasonably interpreted § 1910.1029(g)(3), where the Court of Appeals, having deferred to the interpretation given by the Commission, had had no occasion to address the reasonableness of the Secretary's interpretation.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Administrative Law § 84; Evidence § 167; Safety and Health § 5; Statutes § 145.4 — interpretation of OSH Act regulation — judicial review — deference to Secretary of Labor or Occupational Safety and Health Review Commission

1a-1d. Where the United States

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

61 Am Jur 2d, Plant and Job Safety—OSHA and State Laws § 127

17 Federal Procedure, L Ed, Health, Education, and Welfare § 42:1413

10A Federal Procedural Forms, L Ed, Health, Education, and Welfare § 37:253

2 Am Jur Proof of Facts 2d 517, Failure to Provide Safe Place to Work

29 USCS §§ 651 et seq.

RIA Employment Coordinator ¶ WS-15,712

L Ed Digest, Administrative Law § 84; Safety and Health § 5

L Ed Index, Administrative Law; Appeal and Error; Occupational Safety and Health Act

Index to Annotations, Administrative Law; Appeal and Error; Occupational Safety and Health

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Participation by Occupational Safety and Health Review Commission as party in proceedings for judicial review of its decision. 65 ALR Fed 599.

Validity, construction, and application of personal protective equipment subpart of OSHA general industry standards (29 CFR §§ 1910.132-1910.140). 39 ALR Fed 141.

Validity, under Federal Constitution, of provisions of Occupational Safety and Health Act of 1970 (29 USCS §§ 651 et seq.) relating to inspections, enforcement of civil penalties, and administrative or judicial review. 34 ALR Fed 82.

Judicial relief against, or review of, actions or orders of Occupational Safety and Health Review Commission under OSHA. 22 ALR Fed 508.

Secretary of Labor and the Occupational Safety and Health Review Commission furnish reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary under the Occupational Safety and Health Act of 1970 (OSH Act) (29 USCS §§ 651 et seq.), a reviewing court should defer to the Secretary's interpretation, because (1) the power to render authoritative interpretations of OSH Act regulations is a necessary adjunct of the Secretary's powers under the OSH Act to promulgate and to enforce national workplace health and safety standards; (2) as promulgator, the Secretary is in a better position than is the Commission to reconstruct the purpose of OSH Act regulations; (3) as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission—which encounters only those regulatory episodes resulting in contested citations—with the result that the Secretary is more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation; (4) it is presumed that Congress intended to invest interpretive power in the administrative actor in the best position to develop historical familiarity and policymaking expertise; and (5) the legislative history of the OSH Act—which indicates that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them—supports such a conclusion.

Administrative Law § 84; Evidence § 248 — construction of regulations — deference to agency — presumption

2. An agency's construction of its own regulations is entitled to substantial deference; in situations in which the meaning of regulatory language is not free from doubt, a reviewing court should give effect to the agency's interpretation so long as it is reasonable—that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations; because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, it is presumed that the agency's power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.

Administrative Law §§ 23, 40; Safety and Health §§ 3, 4 — OSH Act — enforcement, rule-making, and adjudicative powers

3. The Occupational Safety and Health Act of 1970 (29 USCS §§ 651 et seq.) establishes a regulatory scheme in which enforcement and rule-making powers are separated from adjudicative powers, and these respective functions are assigned to two independent administrative authorities—the United States Secretary of Labor and the Occupational Safety and Health Review Commission—in order to achieve a greater separation of functions than exists within the traditional "unitary" agency which, under the Administrative Procedure Act (5 USCS § 554(d)), generally must divide enforcement and adjudication between separate personnel.

Evidence § 253 — delegation by Congress — presumption

4. Historical familiarity and policymaking expertise account for the presumption that Congress delegates

interpretive lawmaking power to an administrative agency rather than to the reviewing court.

Administrative Law §§ 40, 84; Safety and Health §§ 3, 4; Statutes §§ 145.4, 147, 174 — power to interpret OSH Act regulation — adjudicatory power

5a-5c. The legislative history of the Occupational Safety and Health Act of 1970 (OSH Act) (29 USCS §§ 651 et seq.) supports the conclusion that Congress intended to invest power to interpret the OSH Act in the United States Secretary of Labor, rather than the Occupational Safety and Health Review Commission, as the administrative actor in the best position to develop historical familiarity and policymaking expertise, because (1) the Senate committee report explained that combining legislative and enforcement powers in the Secretary would result in a sounder program since the combination would make a single administrative actor responsible for (a) formulating rules, (b) seeing that such rules are workable and effective in their day-to-day application, and (c) overall implementation of the program, and (2) dividing the power to promulgate and enforce OSH Act standards from the power to make law by interpreting such standards instead would make two administrative actors ultimately responsible for implementing the OSH Act's policy objectives; it cannot be inferred that Congress expected the Commission to use its adjudicatory power to play a policymaking role, where Congress did not invest the Commission with the power either (1) to make law or policy by other means, or (2) to interpret regulations that the Commission has promulgated; the more plausible inference is that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency review context.

Administrative Law §§ 23, 40 — powers — rule making — enforcement — adjudication

6. Within traditional administrative agencies—that is, agencies possessing rule-making, enforcement, and adjudicative powers in a unitary structure—adjudication operates as an appropriate mechanism for not only factfinding, but also the exercise of delegated lawmaking powers, including lawmaking by regulatory interpretation; when a traditional, unitary agency uses adjudication to engage in lawmaking by regulatory interpretation, the agency necessarily interprets regulations that it has promulgated.

Administrative Law §§ 23, 40, 202; Safety and Health §§ 3, 4, 5 — OSH Act — powers — enforcement — interpretation — adjudication — judicial review

7. The Occupational Safety and Health Act of 1970 (OSH Act) (29 USCS §§ 651 et seq.) does not require that administrative enforcement powers be separated from authoritative interpretive powers, because (1) the OSH Act vests authoritative factfinding power and the power to adjudicatory review by an administrative law judge in the Occupational Safety and Health Review Commission, an administrative body wholly independent of the administrative enforcer, the United States Secretary of Labor, and (2) the objective of protecting regulated parties from biased interpretations of the Secretary's regulations is achieved when the Commission and, ulti-

mately, a United States Court of Appeals review the Secretary's interpretation to assure that it is consistent with the regulatory language and is otherwise reasonable.

Administrative Law § 275 — judicial review — weight given agency position

8. An agency's litigating positions in the course of an administrative penalty action are not entitled to deference when they are merely appellate counsel's post hoc rationalizations for agency action, advanced for the first time in a reviewing court.

Administrative Law §§ 84, 90, 91; Safety and Health §§ 3, 4, 5 — OSH Act regulations — interpretation — enforcement — judicial review

9. The interpretation by the United States Secretary of Labor, in an administrative adjudication before the Occupational Safety and Health Review Commission, of regulations promulgated under the Occupational Safety and Health Act of 1970 (OSH Act) (29 USCS §§ 651 et seq.) is agency action, rather than a post hoc rationalization of such action which would not be entitled to deference by a reviewing court; moreover, since the Secretary's interpretation, when embodied in a citation, assumes a form expressly provided for by Congress in 29 USCS § 658, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard under the OSH Act.

Administrative Law §§ 84, 90; Safety and Health §§ 3, 4, 5 — OSH Act regulations — informal interpretations — enforcement — judicial review

10. The United States Secretary of Labor's use of less formal means of interpreting regulations promulgated under the Occupational Safety and Health Act of 1970 (29 USCS §§ 651 et seq.)—such as the promulgation of interpretive rules and the publication of agency enforcement guidelines—prior to issuing a citation is not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers; however, such informal interpretations are still entitled to some weight on judicial review, and a reviewing court may consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor which bears on the reasonableness of the Secretary's position.

Administrative Law §§ 32, 45; Constitutional Law § 55 — powers — delegation by Congress

11. Subject to only constitutional limits, Congress is free, in a regulatory scheme, to sever the power authoritatively to interpret regulations from the power to promulgate and enforce them.

Administrative Law §§ 84, 90, 275; Safety and Health §§ 4, 5 — OSH Act regulation — interpretation — use of citation — judicial review

12. The United States Secretary of Labor's interpretation of an ambiguous regulation promulgated under the Occupational Safety and Health Act of 1970 (29 USCS §§ 651 et seq.) is subject to the same standard of substantive review by a reviewing court as any other exercise of delegated lawmaking power; although

such interpretation is not undeserving of deference merely because the Secretary advances it for the first time in an administrative adjudication, the reasonableness of the Secretary's decision to use a citation as the initial means for announcing a particular interpretation may bear on (1) the adequacy of notice to regulated parties, (2) the quality of the Secretary's elaboration of pertinent policy considerations, and (3) other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers.

Appeal § 1692.2 — remand — issue not decided below

13. On certiorari, the United States Supreme Court will leave for resolution on remand the issue whether the United States Secretary of Labor reasonably interpreted 29 CFR § 1910.1029(g)(3)—a regulation promulgated by the Secretary under the Occupational Safety and Health Act of 1970 (29 USCS §§ 651 et seq.) —where the Federal Court of Appeals below, having incorrectly deferred to a conflicting interpretation given by the Occupational Safety and Health Review Commission, had no occasion to address the reasonableness of the Secretary's interpretation.

SYLLABUS BY REPORTER OF DECISIONS

The Occupational Safety and Health Act of 1970 assigns distinct regulatory tasks to two independent administrative actors: petitioner Secretary of Labor is charged with setting and enforcing workplace health and safety standards, and respondent Occupational Safety and Health Review Commission is responsible for carrying out adjudicatory functions. The Act also requires a court of appeals reviewing a Commission order to treat as "conclusive" Commission findings of fact that are "supported by substantial evidence." In this case, having found that respondent CF&I Steel Corporation had equipped some of its employees with loose-fitting respirators that exposed them to impermissible coke-oven emission levels, the Secretary issure a citation to CF&I and assessed a monetary penalty against it for violating a regulation promulgated by the Secretary requiring an employer to institute a respiratory protection program. The Commission vacated the citation, ruling that the facts did not establish a violation of that regulation, which was the sole asserted basis for liability, since the regulation expressly requires only that an employer train employees in the proper use of respirators, whereas another regulation expressly states the employer's obligation to assure a proper fit. The Court of Appeals affirmed, holding that where, as here, the relevant regulations are ambiguous, a reviewing court must defer to the Commission's reasonable interpretation rather than the Secretary's interpretation, since Congress intended to delegate to the Commission the normal complement of adjudicative powers possessed by traditional administrative agencies, including the power to " 'declare' the law." Concluding that the Commission's interpretation was a reasonable one, the court did not assess the reasonableness of the Secretary's competing view.

Held: A reviewing court should defer to the Secretary when the Secretary and the Commission furnish reasonable but conflicting interpreta-

tions of an ambiguous regulation promulgated by the Secretary under the Act.

(a) It must be inferred from the Act's unusual "split enforcement" structure and from its legislative history that the power to render authoritative interpretations of the Secretary's regulations is a necessary adjunct of the Secretary's rulemaking and enforcement powers. The Secretary, as the promulgator of standards, is in a better position than the Commission to reconstruct the purpose of particular regulations. Moreover, since the Secretary, as enforcer, comes into contact with a much greater number of regulatory problems than does the Commission, the Secretary is more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation. Furthermore, dividing the power to make and enforce standards from the power to make law by interpreting them would make *two* administrative actors ultimately responsible for implementing the Act's policy objectives, an outcome inconsistent with Congress' intent in combining legislative and enforcement powers in the Secretary. It must also be concluded that Congress did not intend to endow the Commission with the normal adjudicative powers possessed by a traditional, unitary agency. Such an agency permissibly uses adjudication to engage in lawmaking and policymaking only because it also has been delegated the power to make law and policy through rulemaking and necessarily interprets regulations that *it* has promulgated. The more plausible inference is that the Commission was meant to have the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context, such that the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness and possesses no more power than is necessary to make authoritative findings of fact and to apply the Secretary's standards to those facts in making a decision. Although the Commission was established in response to concerns that combining rulemaking, enforcement, and adjudicatory power in the Secretary would leave employers unprotected from prosecutorial bias, such concerns are dispelled by the vesting of authoritative factfinding and review powers in a body wholly independent of the administrative enforcer; regulated parties are protected from biased interpretations when the Commission and ultimately the court of appeals review the Secretary's interpretation for reasonableness. Nor is such an interpretation, when furnished in the course of an administrative adjudication, a mere "litigating position" undeserving of judicial deference under this Court's precedents. Since such an interpretation *is* agency action, not a post hoc rationalization of it, and assumes a form expressly provided for by Congress when embodied in a citation, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of health and safety standards.

(b) The reviewing court should defer to the Secretary only if the Secretary's interpretation of an ambiguous regulation *is* reasonable. That interpretation is subject to the same Administrative Procedure Act

standard of substantive review that applies to any other exercise of delegated lawmaking power. Moreover, the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties, the quality of the Secretary's elaboration of pertinent policy considerations, and other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers. Since the Court of Appeals did not address the reasonableness of the Secretary's interpretation, it, rather than this Court, must do so in the first instance on remand.

891 F2d 1495, reversed and remanded.

Marshall, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Clifford M. Sloan argued the cause for petitioner.
John D. Faught argued the cause for respondents.
Briefs of Counsel, p 749, infra.

OPINION OF THE COURT

[499 US 146]

Justice **Marshall** delivered the opinion of the Court.

[1a] In this case, we consider the question to whom should a reviewing court defer when the Secretary of Labor and the Occupational Safety and Health Review Commission furnish reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary under the Occupational Safety and Health Act of 1970, 84 Stat 1590, as amended, 29 USC § 651 et seq. [29 USCS §§ 651 et seq.]. The Court of Appeals

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concluded that it should defer to the Commission's interpretation under such circumstances. We reverse.

I

A

The Occupational Safety and Health Act of 1970 (OSH Act or Act) establishes a comprehensive regulatory scheme designed "to assure so far as possible . . . safe and healthful working conditions" for "every working man and woman in the Nation." 29 USC § 651(b) [29 USCS § 651(b)]. See generally Atlas Roofing Co. v Occupational Safety and Health Review Comm'n, 430 US 442, 444-445, 51 L Ed 2d 464, 97 S Ct 1261 (1977). To achieve this objective, the Act assigns distinct regulatory tasks to two different administrative actors: the Secretary of Labor (Secretary); and the Occupational Safety and Health Review Commission (Commission), a three-member board appointed by the President with the advice and consent of the Senate. 29 USC §§ 651(b)(3), 661 [29 USCS §§ 651(b)(3), 661].

The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards. See Cuyahoga Valley R. Co. v United Transportation Union, 474 US 3, 6-7, 88 L Ed 2d 2, 106 S Ct 286 (1985) (per curiam). The Secretary establishes these standards through the exercise of rule-making powers. See 29 USC § 665 [29 USCS § 665]. If the Secretary (or the Secretary's designate) determines upon investigation that an employer is failing to comply with such a standard, the Secretary is authorized to issue a citation and to assess the

employer a monetary penalty. §§ 658-659, 666.[1]

The Commission is assigned to "carr[y] out adjudicatory functions" under the Act. § 651(b)(3). If an employer

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wishes to contest a citation, the Commission must afford the employer an evidentiary hearing and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." § 659(c). Initial decisions are made by an administrative law judge (ALJ), whose ruling becomes the order of the Commission unless the Commission grants discretionary review. § 661(j). Both the employer and the Secretary have the right to seek review of an adverse Commission order in the court of appeals, which must treat as "conclusive" Commission findings of fact that are "supported by substantial evidence." § 660(a)-(b).

B

This case arises from the Secretary's effort to enforce compliance with OSH Act standards relating to coke-oven emissions. Promulgated pursuant to the Secretary's rulemaking powers, these standards establish maximum permissible emissions levels and require the use of employee respirators in certain circumstances. See 29 CFR § 1910.1029 (1990). An investigation by one of the Secretary's compliance officers revealed that respondent CF&I Steel Corporation (CF&I) had equipped 28 of its employees with respirators that failed an "atmospheric test" designed to determine whether a respirator provides a sufficiently tight fit to protect its wearer from carcinogenic emissions. As a result of being equipped with these loose-fitting respirators, some employees were exposed to coke-oven emissions exceeding the regulatory limit. Based on these findings, the compliance officer issued a citation to CF&I and assessed it a $10,000 penalty for violating 29 CFR § 1910.1029(g)(3) (1990), which requires an employer to "institute a respiratory protection program in accordance with § 1910.134." CF&I contested the citation.

The ALJ sided with the Secretary, but the full Commission subsequently granted review and vacated the citation. See CF&I, 12 OSHC 2067 (1986). In the Commission's view, the "respiratory protection program" referred to in

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§ 1910.1029(g)(3) expressly requires only that an employer train employees in the proper use of respirators;[2] the obligation to assure proper fit of an individual employee's respirator, the Commission noted, was expressly stated in another regulation,

1. The Secretary has delegated certain statutory responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration. See Secretary of Labor's Order No. 12-71, 36 Fed Reg 8754 (1971); Order No. 8-76, 41 Fed Reg 25059 (1976); Order No. 9-83, 48 Fed Reg 35736 (1983).

2. For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere." 29 CFR § 1910.134(e)(5) (1990).

namely, § 1910.1029(g)(4)(i).[3] See 12 OSHC, at 2077-2078. Reasoning, inter alia, that the Secretary's interpretation of § 1910.1029(g)(3) would render § 1910.1029(g)(4) superfluous, the Commission concluded that the facts alleged in the citation and found by the ALJ did not establish a violation of § 1910.1029(g)(3). See 12 OSHC, at 2078-2079. Because § 1910.1029(g)(3) was the only asserted basis for liability, the Commission vacated the citation. See id., at 2079.

The Secretary petitioned for review in the Court of Appeals for the Tenth Circuit, which affirmed the Commission's order. See Dole v Occupational Safety and Health Review Commission, 891 F2d 1495 (1989). The court concluded that the relevant regulations were ambiguous as to the employer's obligation to assure proper fit of an employee's respirator. The court thus framed the issue before it as *whose* reasonable interpretation of the regulations, the Secretary's or the Commission's, merited the court's deference. See id., at 1497. The court held that the Commission's interpretation

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was entitled to deference under such circumstances, reasoning that Congress had intended to delegate to the Commission "the normal complement of adjudicative powers possessed by traditional administrative agencies" and that "[s]uch an adjudicative function necessarily encompasses the power to 'declare' the law." Id., at 1498. Although the court determined that it would "certainly [be] possible to reach an alternate interpretation of the ambiguous regulatory language," the court nonetheless concluded that the Commission's interpretation was a reasonable one. Id., at 1500. The court therefore deferred to the Commission's interpretation without assessing the reasonableness of the Secretary's competing view. See ibid.

The Secretary thereafter petitioned this Court for a writ of certiorari. We granted the petition in order to resolve a conflict among the Circuits on the question whether a reviewing court should defer to the Secretary or to the Commission when these actors furnish reasonable but conflicting interpretations of an ambiguous regulation under the OSH Act.[4] 497 US 1002, 111 L Ed 2d 747, 110 S Ct 3235 (1990).

II

[2] It is well established "that an agency's construction of its own regulations is entitled to substantial deference." Lyng v Payne, 476 US 926, 939, 90 L Ed 2d 921, 106 S Ct 2333 (1986); accord, Udall v Tallman, 380 US 1, 16-17, 13 L Ed 2d

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3. This regulation states in pertinent part: "*Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly." § 1910.1029. According to the Commission, the compliance officer who issued the citation "acknowledged that [§ 1910.1029(g)(4)(i)] applied," and "that he might have cited the wrong standard." CF&I, 12 OSHC 2067, 2078 (1986).

4. Compare Brock v Williams Enterprises of Georgia, Inc. 832 F2d 567, 569-570 (CA11 1987) (deference to Secretary); United Steelworkers of America v Schuylkill Metals Corp., 828 F2d 314, 319 (CA5 1987) (same); and Donovan v A. Amorello & Sons, Inc. 761 F2d 61, 65-66 (CA1 1985) (same), with Brock v Cardinal Industries, Inc., 828 F2d 373, 376, n 4 (CA6 1987) (deference to Commission); Brock v Bechtel Power Corp. 803 F2d 999, 1000-1001 (CA9 1986) (same); and Marshall v Western Electric, Inc. 565 F2d 240, 244 (CA2 1977) (same).

616, 85 S Ct 792 (1965). In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is "reasonable," Ehlert v United States, 402

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US 99, 105, 28 L Ed 2d 625, 91 S Ct 1319 (1971), that is, so long as the interpretation "sensibly conforms to the purpose and wording of the regulations," Northern Indiana Pub. Serv. Co. v Porter County Chapter of Izaak Walton League of America, Inc. 423 US 12, 15, 46 L Ed 2d 156, 96 S Ct 172 (1975). Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers. See Ford Motor Credit Co. v Milhollin, 444 US 555, 566, 568, 63 L Ed 2d 22, 100 S Ct 790 (1980). The question before us in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this "interpretive" lawmaking power under the OSH Act.[5]

[3] To put this question in perspective, it is necessary to take account of the unusual regulatory structure established by the Act. Under most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority. See, e. g., 15 USC § 41 et seq. [15 USCS §§ 41 et seq.] (Federal Trade Commission); 15 USC §§ 77s-77u [15 USCS §§ 77s-77u] (Securities and Exchange Commission); 47 USC § 151 et seq. [47 USCS §§ 151 et seq.] (Federal Communications Commission). Under the OSH Act, however, Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *different* administrative authorities. The purpose of this "split enforcement" structure was to achieve a greater separation of functions than exists within the traditional "unitary" agency, which under the Administrative Procedure Act (APA) generally must divide enforcement and adjudication between separate personnel, see 5 USC § 554(d) [5 USCS § 554(d)]. See generally Johnson, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, 39 Admin L Rev 315, 317-319 (1987).

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This is notthe first time that we have been called upon to resolve an OSH Act "jurisdictional" dispute between the Secretary and the Commission. See Cuyahoga Valley R. Co. v United Transportation Union, 474 US, at 3, 88 L Ed 2d 2, 106 S Ct 286. At issue in Cuyahoga Valley was whether the Commission could conduct an administrative adjudication notwithstanding the Secretary's motion to vacate the citation. We held that the Commission had no such power. We noted that "enforcement of the Act is the sole responsibility of the Secretary" and concluded that "[a] necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer." Id., at 6-7, 88 L Ed 2d 2, 106 S Ct 286. The Commission's role as "neutral arbiter," we explained, "plainly does

5. The parties do not challenge the Court of Appeals' conclusion that the regulations at issue in this case are ambiguous. We assume that this conclusion is correct for purposes of our analysis.

not extend to overturning the Secretary's decision not to issue or to withdraw a citation." Id., at 7, 88 L Ed 2d 2, 106 S Ct 286.

[1b, 4] Although the Act does not expressly address the issue, we now infer from the structure and history of the statute, see id., at 6-7, 88 L Ed 2d 2, 106 S Ct 286, that the power to render authoritative interpretations of OSH Act regulations is a "necessary adjunct" of the Secretary's powers to promulgate and to enforce national health and safety standards. The Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question. Moreover, by virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations. Cf. Note, Employee Participation in Occupational Safety and Health Review Commission Proceedings, 85 Colum L Rev 1317, 1331, and n 90 (1985) (reporting small percentage of OSH Act citations contested between 1979 and 1985). Consequently, the Secretary is more likely to develop the expertise relevant to assessing the effect

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of a particular regulatory interpretation. Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, see, e. g., Mullins Coal Co. v Director, Office of Workers' Compensation Programs, 484 US 135, 159, 98 L Ed 2d 450, 108 S Ct 427 (1987); Ford Motor Credit Co. v Milhollin, supra, at 566, 63 L Ed 2d 22, 100 S Ct 790; INS v Stanisic, 395 US 62, 72, 23 L Ed 2d 101, 89 S Ct 1519 (1969), we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.

[1c, 5a] The legislative history of the OSH Act supports this conclusion. The version of the Act originally passed by the House of Representatives vested adjudicatory power in the Commission and rulemaking power in an independent standards board, leaving the Secretary with only enforcement power. 116 Cong Rec 38716 (1970), reprinted in Legislative History of the Occupational Safety and Health Act of 1970 (S 2193, Pub L 91-596) (Committee Print prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), pp 1094-1096 (1971) (Legislative History). The Senate version dispensed with the standards board and established the division of responsibilities that survives in the enacted legislation. The Senate Committee Report explained that combining legislative and enforcement powers in the Secretary would result in "a sounder program" because it would make a single administrative actor responsible for "formulat[ing] rules . . . and for seeing that they are workable and effective in their day-to-day application," and would allow Congress to hold a single administrative actor politically "accountable for the overall implementation of that program." S Rep No. 91-1282, p 8 (1970), reprinted in Legislative History 148. Because dividing the power

to promulgate and enforce OSH Act standards from the power to make law by interpreting them would make *two* administrative actors ultimately responsible for implementing

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the Act's policy objectives, we conclude that Congress did not expect the Commission to possess authoritative interpretive powers.

[5b, 6] For the same reason, we reject the Court of Appeals' inference that Congress intended "to endow the Commission with the normal complement of adjudicative powers possessed by *traditional* administrative agencies." 891 F2d, at 1498 (emphasis added). Within traditional agencies—that is, agencies possessing a *unitary* structure—adjudication operates as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation. See NLRB v Bell Aerospace Co. 416 US 267, 292-294, 40 L Ed 2d 134, 94 S Ct 1757 (1974); SEC v Chenery Corp. 332 US 194, 201-203, 91 L Ed 1995, 67 S Ct 1575 (1947). But in these cases, we concluded that agency adjudication is a generally permissible mode of lawmaking and policymaking only because the unitary agencies in question also had been delegated the power to make law and policy through rulemaking. See Bell Aerospace, supra, at 292-294, 40 L Ed 2d 134, 94 S Ct 1757; Chenery Corp., supra, at 202-203, 91 L Ed 1995, 67 S Ct 1575. See generally Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv L Rev 921 (1965). Insofar as Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policy-making role. Moreover, when a traditional, unitary agency uses adjudication to engage in lawmaking by regulatory interpretation, it necessarily interprets regulations that *it* has promulgated. This, too, cannot be said of the Commission's power to adjudicate.

[5c] Consequently, we think the more plausible inference is that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency

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with the regulatory language and for reasonableness. In addition, of course, Congress expressly charged the Commission with making authoritative findings of fact and with applying the Secretary's standards to those facts in making a decision. See 29 USC § 660(a) [29 USCS § 660(a)] (Commission's factual findings "shall be conclusive" so long as "supported by substantial evidence"). The Commission need be viewed as possessing no more power than this in order to perform its statutory role as "neutral arbiter." See Cuyahoga Valley, 474 US, at 7, 88 L Ed 2d 2, 106 S Ct 286.

CF&I draws a different conclusion from the history and structure of the Act. Congress, CF&I notes, established the Commission in response to concerns that combining rulemaking, enforcement, and adjudicatory power in the Secretary would leave employers unprotected from regulatory bias. Construing the Act to separate enforcement and interpretive powers is consistent with this purpose, CF&I argues, because it pro-

tects regulated employers from biased prosecutorial interpretations of the Secretary's regulations. Indeed, interpretations furnished in the course of administrative penalty actions, according to CF&I, are mere "litigating positions," undeserving of judicial deference under our precedents. See, e. g., Bowen v Georgetown Univ. Hospital, 488 US 204, 212, 102 L Ed 2d 493, 109 S Ct 468 (1988).

[7] Although we find these concerns to be important, we think that they are overstated. It is clear that Congress adopted the split-enforcement structure in the OSH Act in order to achieve a greater separation of functions than exists in a conventional unitary agency. See S Rep No. 91-1282, supra, at 56, reprinted in Legislative History 195 (individual views of Sen. Javits) (noting that adjudication by independent panel goes beyond division of functions under the APA but defending split-enforcement structure as "more closely [in] accor[d] with traditional notions of due process"). But the conclusion that the Act should therefore be understood to separate enforcement powers from authoritative interpretive powers

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begs the question just *how much* Congress intended to depart from the unitary model. Sponsors of the Commission purported to be responding to the traditional objection that an agency head's participation in or supervision of agency investigations results in biased review of the decisions of the hearing officer, notwithstanding internal separations within the agency. See ibid. See generally 3 K. Davis, Administrative Law Treatise § 18.8, pp 369-370 (2d ed 1980). Vesting authoritative factfinding and ALJ-review powers in the Commission, an administrative body wholly independent of the administrative enforcer, dispels this concern.

We harbor no doubt that Congress also intended to protect regulated parties from biased interpretations of the Secretary's regulations. But this objective is achieved when the Commission, and ultimately the court of appeals, review the Secretary's interpretation to assure that it is consistent with the regulatory language and is otherwise *reasonable*. Giving the Commission the power to substitute *its* reasonable interpretations for the Secretary's might slightly increase regulated parties' protection from overzealous interpretations. But it would also clearly frustrate Congress' intent to make a single administrative actor "accountable for the overall implementation" of the Act's policy objectives by combining legislative and enforcement powers in the Secretary. S Rep No. 91-1282, p 8, reprinted in Legislative History 148.

[8, 9] We are likewise unpersuaded by the contention that the Secretary's interpretations of regulations will necessarily appear in forms undeserving of judicial deference. Our decisions indicate that agency "litigating positions" are not entitled to deference when they are merely appellate counsel's "post hoc rationalizations" for agency action, advanced for the first time in the reviewing court. See Bowen v Georgetown Univ. Hospital, supra, at 212, 102 L Ed 2d 493, 109 S Ct 468; Burlington Truck Lines, Inc. v United States, 371 US 156, 168, 9 L Ed 2d 207, 83 S Ct 239 (1962). Because statutory and regulatory interpretations furnished in this setting occur *after* agency proceedings have terminated, they do not

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constitute an exercise of the

agency's delegated lawmaking powers. The Secretary's interpretation of OSH Act regulations in an administrative adjudication, however, *is* agency action, not a post hoc rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. See 29 USC § 658 [29 USCS § 658]. Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard.

[10] In addition, the Secretary regularly employs less formal means of interpreting regulations prior to issuing a citation. These include the promulgation of interpretive rules, see, e. g., Marshall v W and W Steel Co. 604 F2d 1322, 1325-1326 (CA10 1979); cf. Whirlpool Corp. v Marshall, 445 US 1, 11, 63 L Ed 2d 154, 100 S Ct 883 (1980), and the publication of agency enforcement guidelines, see United States Department of Labor, OSHA Field Operations Manual (3d ed 1989). See generally S. Bokat & H. Thompson, Occupational Safety and Health Law 658-660 (1988). Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial review. See Batterton v Francis, 432 US 416, 425-426, and n 9, 53 L Ed 2d 448, 97 S Ct 2399 (1977); Skidmore v Swift & Co. 323 US 134, 140, 89 L Ed 124, 65 S Ct 161 (1944); Whirlpool, supra, at 11, 63 L Ed 2d 154, 100 S Ct 883. A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position. See Ehlert v United States, 402 US, at 105, 28 L Ed 2d 625, 91 S Ct 1319.

III

[1d, 11] We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSHA Act. We conclude from the available indicia of legislative intent that Congress

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did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them. Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure. Nor should anything we say today be understood to bear on whether particular divisions of enforcement and adjudicative power within a unitary agency comport with § 554(d) of the APA.

[12] In addition, although we hold that a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary, we emphasize that the reviewing court should defer to the Secretary only if the Secretary's interpretation *is* reasonable. The Secretary's interpretation of an ambiguous regulation is subject to the same standard of substantive review as any other exercise of delegated lawmaking power. See 5 USC § 706(2)(A) [5 USCS § 706(2)(A)];

Batterton v Francis, supra, at 426, 53 L Ed 2d 448, 97 S Ct 2399. As we have indicated, the Secretary's interpretation is not undeserving of deference merely because the Secretary advances it for the first time in an administrative adjudication. But as the Secretary's counsel conceded in oral argument, Tr of Oral Arg 18-19, 20-21, the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties, see Bell Aerospace, 416 US, at 295, 40 L Ed 2d 134, 94 S Ct 1757; Bowen v Georgetown Univ. Hospital, 488 US, at 220, 102 L Ed 2d 493, 109 S Ct 468 (Scalia, J., concurring), on the quality of the Secretary's elaboration of pertinent policy considerations, see Motor Vehicle Mfrs. Assn. of United States, Inc. v State Farm Mut. Automobile Ins. Co. 463 US 29, 43, 77 L Ed 2d 443, 103 S Ct 2856 (1983), and on other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers.

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[13] CF&I urges us to hold that the Secretary unreasonably interpreted 29 CFR § 1910.1029(g)(3) (1990) in this case. However, because the Court of Appeals deferred to the Commission's interpretation, it had no occasion to address the reasonableness of the Secretary's interpretation. Rather than consider this issue for the first time ourselves, we leave the issue for resolution on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered.

[499 US 160]

UNITED STATES, et al., Petitioners

v

MARCUS S. SMITH et al.

499 US 160, 113 L Ed 2d 134, 111 S Ct 1180

[No. 89-1646]

Argued November 7, 1990. Decided March 20, 1991.

Decision: Federal Employees Liability Reform and Tort Compensation Act of 1988 held to preclude person injured abroad by United States military physician from seeking damages from such physician.

SUMMARY

A military doctor who was working at a United States Army hospital in Italy served as attending physician to an Army sergeant's wife during the delivery of the couple's son. In 1987, the couple filed a federal diversity suit against the doctor in the United States District Court for the Central District of California and alleged that the doctor's negligence during the delivery caused the son to be born with massive brain damage. The Federal Government (1) sought to have itself substituted for the doctor as the defendant pursuant to the Gonzalez Act, which provides, in 10 USCS § 1089(a), that, in suits against military medical personnel for torts committed within the scope of their employment, (a) the Federal Government is to be substituted as the defendant, and (b) the suit is to proceed against the Federal Government under the Federal Tort Claims Act (FTCA) (28 USCS §§ 2671 et seq.); and (2) argued that action should be dismissed, because (a) the action had arisen overseas, and (b) therefore, Federal Government liability was precluded by the FTCA's exception (28 USCS § 2680(k)) excluding recovery for injuries sustained abroad. The District Court granted the Federal Government's motion for substitution and dismissed the action. While the couple's appeal was pending, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the 1988 Act), which (1) was made applicable to all proceedings pending on the date of enactment; and (2) generally provided, in 28 USCS § 2679(b)(1), that the remedy against the United States under the FTCA is exclusive of any other civil action or proceeding for money damages by persons injured by Federal

Briefs of Counsel, p 750, infra.

Government employees acting within the scope of their employment. The United States Court of Appeals for the Ninth Circuit, however, in reversing and remanding, expressed the view that neither the Gonzalez Act nor the 1988 Act required the Federal Government's substitution as the defendant in the case at hand or otherwise immunized the doctor in question from liability, because (1) the Gonzalez Act (a) made the FTCA the exclusive remedy only for malpractice committed by stateside military medical personnel, and (b) left foreign-based military medical personnel like the doctor subject to malpractice liability; and (2) the 1988 Act's exclusive remedy (a) applied only when the FTCA in fact provided a remedy, and (b) thus, did not apply in the case at hand, as a result of § 2680(k)'s exclusion of any FTCA remedy (885 F2d 650).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by MARSHALL, J., joined by REHNQUIST, Ch. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., it was held that a person injured abroad by a United States military physician is precluded from seeking damages from the physician, because (1) the 1988 Act, in § 2679(b)(1), generally establishes absolute immunity for Federal Government employees for torts committed in the scope of their employment, even when recovery against the Federal Government under the FTCA is precluded by an exception such as § 2680(k)'s foreign-country exception; (2) such an interpretation does not work an implied repeal of the Gonzalez Act, for, even if the Gonzalez Act does not immunize a physician from a malpractice action brought under state or foreign law for causing such an injury abroad, the 1988 Act (a) does not repeal anything enacted by the Gonzalez Act, but (b) adds to what Congress created in the Gonzalez Act, namely, protection from liability for military doctors; (3) the 1988 Act applies to federal employees even if those employees were already protected from tort liability in some fashion by a pre-existing, federal immunity statute such as the Gonzalez Act; and (4) even if a tort claim brought against a military doctor under a state or foreign law for malpractice abroad could be deemed "authorized" by the Gonzalez Act, such a claim does not fall within the 1988 Act's exception permitting suits for a violation of a federal statute under which an action against an individual employee is "otherwise authorized" (28 USCS § 2679(b)(2)(B)), for (a) nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians, and (b) consequently, a physician allegedly committing medical malpractice under state or foreign law does not "violate" the Gonzalez Act.

STEVENS, J., dissenting, expressed the view that (1) no legislative purpose was achieved by the court's holding, because federal health care personnel stationed abroad were already protected from personal malpractice liability by the Gonzalez Act's authorization, under 10 USCS § 1089(f) and under implementing regulations, for such personnel to be insured or indemnified by the Federal Government for claims not covered by the FTCA, such as claims arising in foreign countries; and (2) Congress did not intend the 1988 Act to preclude the couple in the case at hand, and other plaintiffs like

them, from pursuing their pre-existing, common-law claims against an allegedly negligent doctor working abroad, even though that doctor was indemnified by the Federal Government.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

35 Am Jur 2d, Federal Tort Claims Act §§ 3, 13, 50, 72, 79; 54 Am Jur 2d, Military, and Civil Defense §§ 290, 291; 61 Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 299, 300; 63A Am Jur 2d, Public Officers and Employees § 367

16 Federal Procedure, L Ed, Government Officers and Employees § 40:581; 31 Federal Procedure, L Ed, Tort Claims Against the United States § 73:374

15A Federal Procedural Forms, L Ed, Tort Claims Against United States §§ 63:82, 63:83, 63:101

11A Am Jur Pl & Pr Forms (Rev), Federal Tort Claims Act, Forms 11, 12, 51

8 Am Jur Trials 635, Federal Tort Claims Acts Proceedings

10 USCS § 1089; 28 USCS §§ 2679(b), 2680(k)

L Ed Digest, Armed Forces § 33; Claims § 12

L Ed Index, Armed Forces; Claims Against Government; Malpractice; Privilege and Immunities; Public Officers and Employees

Index to Annotations, Armed Forces; Federal Tort Claims Act; Malpractice by Medical or Health Professions; Privileges and Immunities

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. 42 L Ed 2d 946.

Construction and application of 28 USC § 2680 excepting specified claims from scope of Federal Tort Claims Act. 6 L Ed 2d 1422.

What constitutes "claim arising in a foreign country" under 28 USCS § 2680(k), excluding such claims from Federal Tort Claims Act. 57 ALR Fed 275.

Serviceman's right to recover under Federal Tort Claims Act (28 USCS §§ 2671 et seq.). 31 ALR Fed 146.

Federal Tort Claims Act: Medical malpractice cases. 9 ALR Fed 16.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Armed Forces § 33; Claims § 12; Statutes §§ 145.4, 241 — person injured abroad by military physician — suit against physician — Federal Tort Claims Act

1a-1h. A person injured abroad by a United States military physician is precluded from seeking damages from the physician, because (1) § 5 of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the 1988 Act)—which, in 28 USCS § 2679(b)(1), makes an action against the Federal Government under the Federal Tort Claims Act (FTCA) (28 USCS §§ 2671 et seq.) the exclusive remedy for torts committed by Federal Government employees in the scope of their employment—generally establishes absolute immunity for such employees for such torts, even when recovery against the Federal Government under the FTCA is precluded by an exception such as the FTCA's exception for injuries sustained abroad (28 USCS § 2680(k)); (2) such an interpretation does not work an implied repeal of the Gonzalez Act—which provides, in 10 USCS § 1089(a), that, for torts committed by military medical personnel within the scope of their employment, a suit against the Federal Government under the FTCA is the exclusive remedy—for, even if the Gonzalez Act does not immunize a physician from a malpractice action brought under state or foreign law for causing such an injury abroad, the 1988 Act (a) does not repeal anything enacted by the Gonzalez Act, but (b) adds to what Congress created in the Gonzalez Act, namely, protection from liability for military doctors; (3) the 1988 Act applies to federal employees even if those employees were already protected from tort liability in some fashion by a pre-existing, federal immunity statute such as the Gonzalez Act; and (4) even if a tort claim brought against a military doctor under a state or foreign law for malpractice abroad could be deemed "authorized" by the Gonzalez Act, such a claim does not fall within the 1988 Act's exception permitting suits for a violation of a federal statute under which an action against an individual employee is "otherwise authorized" (28 USCS § 2679(b)(2)(B)), for, even though the legislative history fails to disclose what causes of action Congress sought to preserve in § 2679(b)(2)(B), a malpractice suit alleging a "violation" of the Gonzalez Act cannot have been one of them, since (a) nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians, and (b) consequently, a physician allegedly committing medical malpractice under state or foreign law does not "violate" the Gonzalez Act. (Stevens, J., dissented from this holding.)

Appeal §§ 1087.5(2), 1662 — failure to raise question in petition for certiorari — effect of decision on other grounds

2a, 2b. On certiorari to review a Federal Court of Appeals' decision—that neither the Gonzalez Act, in 10 USCS § 1089(a), nor the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the 1988 Act), in 28 USCS § 2679(b)(1), required the substitution of the Federal Government as the defendant or otherwise immunized a doctor from liability for malpractice allegedly committed by the doctor while work-

ing at a United States Army hospital in Italy—the United States Supreme Court need not address the portion of the Court of Appeals' decision which ruled that the Gonzalez Act left foreign-based military medical personnel such as the doctor subject to malpractice liability, where the Federal Government did not raise that Gonzalez Act question in the government's petition for certiorari; in any event, that Gonzalez Act question is rendered irrelevant by the Supreme Court's holding that the 1988 Act confers immunity on the doctor.

Claims § 12; Statutes §§ 102, 103, 108.5, 147, 176; United States § 107 — suit against employee — Federal Tort Claims Act

3a-3f. Section 5 of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the 1988 Act)—which provides, in 28 USCS § 2679(b)(1), that the remedy against the Federal Government under the Federal Tort Claims Act (FTCA) (28 USCS §§ 2671 et seq.) is exclusive of any other civil action or proceeding for money damages against a Federal Government employee for torts committed by such employee in the scope of employment—immunizes Federal Government employees from suit even when recovery against the Federal Government under the FTCA is precluded by an exception such as the FTCA's exception for injuries sustained abroad (28 USCS § 2680(k)), because (1) § 5 implements a congressional intent to that effect, as expressed in a House of Representatives committee report; (2) when another passage in the committee report is read in context, the other passage (a) supports only the conclusion that the 1988 Act preserves the procedural right to initiate an action, and (b) does not suggest that the 1988 Act does not narrow existing, substantive rights of recovery; (3) § 6 of the 1988 Act—which provides, in 28 USCS § 2679(d)(4), that such a suit shall proceed in the same manner as any action against the United States filed pursuant to the FTCA and shall be subject to the "limitations and exceptions" applicable to those actions—demonstrates that Congress recognized that the required substitution of the United States as the defendant would sometimes foreclose a tort plaintiff's recovery altogether; (4) Congress' express creation, in 28 USCS § 2679(b)(2), of two exceptions—for (a) a Bivens action seeking damages for a federal constitutional violation by a Federal Government employee, or (b) an action under a federal statute that authorizes recovery against such an employee—demonstrates that it would be an error to infer a third exception that would preserve tort liability for such employees when suit is barred under the FTCA; and (5) since the specialized § 9 of the 1988 Act, in 16 USCS §§ 831c-2(b)(1), 831c-2(a)(1), confers the same scope of immunity upon Tennessee Valley Authority employees as § 5 confers on other Federal Government employees, § 9 supports no inference either way on the scope of § 5 immunity in such circumstances. (Stevens, J., dissented from this holding.)

Statutes § 176 — express mention and implied exclusion

4. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.

Claims § 12; Statutes §§ 102, 103, 108.5, 145.4, 164; United States §§ 105(2), 107 — suit against Tennessee Valley Authority or its employees — Federal Tort Claims Act

5a-5c. Both the plain language and legislative history of the specialized Tennessee Valley Authority (TVA) provision of § 9 of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the 1988 Act)—which provides (1) in 16 USCS § 831c-2(b)(1), that the TVA shall be substituted as defendant in any suit against a TVA employee arising from actions within the scope of office or employment, and (2) in 16 USCS § 831c-2(a)(1), that an action against the TVA is exclusive of any other civil action or proceeding—indicate that § 9 was intended to give TVA employees the same degree of immunity as § 5 of the 1988 Act gives other employees in 28 USCS § 2679(b)(1), where (1) although, under the TVA exception to the Federal Tort Claims Act (28 USCS § 2680(*l*)), the Federal Government may not be held liable for any claim arising from the TVA's activities, lower federal courts have read 16 USCS § 831c(b), which authorizes the TVA to sue and be sued in its own name, as making the TVA liable to suit in tort subject to certain exceptions; (2) therefore, the most plausible explanation for § 9 is that Congress, in view of such lower-federal-court cases, decided to clarify that the TVA should be substituted in suits brought against TVA employees; and (3) Congress included in § 9 other provisions (16 USCS §§ 831c-2(a)(2), 831c-2(b)(4)) which parallel other general provisions in the 1988 Act.

Statutes § 229 — implied repeals

6. Implied repeals of statutes should be avoided.

Armed Forces § 33; Claims § 12 — doctors — malpractice liability — Federal Tort Claims Act

7a, 7b. With respect to the Gonzalez Act's provision, in 10 USCS § 1089(a), that, for torts committed by United States medical personnel within the scope of their employment, the exclusive remedy is a suit against the Federal Government under the Federal Tort Claims Act (28 USCS §§ 2671 et seq.), that provision (1) functions solely to protect military medical personnel from malpractice liability, and (2) does not create rights in favor of malpractice plaintiffs; with respect to another Gonzalez Act provision which, in 10 USCS § 1089(f), permits agency heads to indemnify and insure foreign-based military medical personnel against liability for torts committed abroad while in the scope of their employment, even though § 5 of the Federal Employees Liability Reform and Tort Compensation Act of 1988, in 28 USCS § 2679(b)(1), generally bars such tort actions against such personnel in state or federal courts—so that insurance or indemnification against malpractice suits in domestic courts is no longer needed—§ 1089(f) still serves to protect foreign-based military personnel against malpractice suits in foreign courts. (Stevens, J., dissented in part from this holding.)

Claims § 12; Statutes §§ 102, 103, 108.5, 147, 164; United States § 107 — suit against employee — Federal Tort Claims Act

8. Section 5 of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the 1988 Act)—which provides, in 28 USCS

§ 2679(b)(1), that, with respect to a tort committed by "any employee of the [Federal] Government" within the scope of employment, the Federal Tort Claims Act (28 USCS §§ 2671 et seq.) provides the exclusive remedy—applies to Federal Government employees who are already protected from tort liability in some fashion by a pre-existing, federal immunity statute, because (1) the 1988 Act's plain language makes no distinction between employees who are covered under pre-existing immunity statutes and those who are not; (2) no language in § 5 or elsewhere in the 1988 Act purports to restrict the phrase "any employee of the Government" in such a manner; and (3) if Congress had intended to exclude such already protected employees, Congress would have said as much, given that (a) Congress created two other exceptions in 28 USCS § 2679(b)(2), and (b) as demonstrated by a House of Representatives committee report, Congress, in drafting the 1988 Act, was aware of the pre-existing immunity statutes.

SYLLABUS BY REPORTER OF DECISIONS

Respondents Smith filed suit in the District Court against one Dr. Marshall, alleging that he had negligently injured respondent Dominique Smith during his birth at a United States Army hospital in Italy. The court granted the Government's motion to substitute itself for Marshall pursuant to the Gonzalez Act, which provides that in a suit against military medical personnel for employment-related torts, the Government is to be substituted as the defendant and the suit is to proceed under the Federal Tort Claims Act (FTCA). The court then dismissed the suit on the ground that the FTCA excludes recovery for injuries sustained abroad. The Court of Appeals reversed, holding that neither the Gonzalez Act nor the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Act) required substitution of the Government or otherwise immunized Marshall. It ruled that § 5 of the Act—which, with two exceptions not here relevant, confers absolute immunity on Government employees by making an FTCA action against the Government the exclusive remedy for their employment-related torts—applies only when the FTCA provides a remedy.

Held: The Act immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government.

(a) The Act's language confirms that § 5 makes the FTCA the exclusive mode of recovery. Congress recognized that requiring substitution of the Government would sometimes foreclose a tort plaintiff's recovery altogether when it provided in § 6 of the Act that suits proceeding under the FTCA are subject to the "limitations and exceptions" applicable to FTCA actions. Moreover, in light of § 5's two express exceptions preserving employee liability, a third exception preserving liability when the FTCA bars suit cannot be implied, absent a contrary legislative intent. Furthermore, the enactment of § 9 of the Act—which provides for the substitution of the Tennessee Valley Authority as defendant in employment-related tort suits against its employees—supports no inference on the scope of § 5 immunity when the FTCA precludes suit against the United States.

(b) Respondents' several arguments to support the decision below are rejected. Construing the Act to preclude Marshall's tort liability does not result in an implied repeal of the Gonzalez Act. The Gonzalez Act functions solely to protect military medical personnel from malpractice liability and does not create rights in favor of malpractice plaintiffs, whose rights arise instead under state or foreign law. Since respondents' rights as malpractice plaintiffs were not created by Congress, the rule disfavoring implied repeals is not implicated when Congress limits those rights. Similarly, respondents' suggestion that the Act was meant to apply solely to those Government employees not already protected from tort liability by a preexisting federal immunity statute is inconsistent with the Act's purpose. The Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not. Congress clearly was aware of the pre-Act immunity statutes. Congress' enactment of the two express limitations of immunity under § 5 of the Act indicates that if it intended to limit the Act's protection to employees not covered under the pre-Act immunity statutes, it would have said this expressly. Finally, since nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians, respondents' malpractice claim does not involve a violation of the Gonzalez Act. Thus, it does not fall within the Act's exception for suits brought for a violation of a United States statute under which action against an employee is otherwise authorized.

885 F2d 650, reversed and remanded.

Marshall, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Blackmun, O'Connor, Scalia, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

David L. Shapiro argued the cause for petitioners.
Walter A. Oleniewski argued the cause for respondents.
Briefs of Counsel, p 750, infra.

OPINION OF THE COURT

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Justice **Marshall** delivered the opinion of the Court.

[1a] The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act or Act) limits the relief available to persons injured by Government employees acting within the scope of their employment. For persons so injured, the Act provides that "[t]he remedy against the

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United States" under the Federal Tort Claims Act (FTCA) "is exclusive of any other civil action or proceeding for money damages." 28 USC § 2679(b)(1) [28 USCS § 2679(b)(1)]. Subject to certain exceptions, the FTCA permits a person injured by a Government employee acting within the scope of his or her employment to seek tort damages against the Government. One exception bars such recovery for injuries sustained outside the country. See 28 USC § 2680(k) [28 USCS § 2680(k)]. This case presents the question whether a person injured abroad by a military physician, and whom the FTCA foreign-country exception therefore precludes from su-

ing the Government, may nonetheless seek damages from the particular Government employee who caused the injury. We hold that the Liability Reform Act bars this alternative mode of recovery.

I

In 1982, while working on the medical staff of the United States Army hospital in Vicenza, Italy, Dr. William Marshall served as attending physician to Hildegard Smith during the delivery of her son Dominique. At this time, Ms. Smith's husband, Marcus Smith, was an Army Sergeant stationed in Italy. According to the Smiths, Dominique was born with massive brain damage. In 1987, the Smiths, who are respondents in this Court, sued Dr. Marshall in the United States District Court for the Central District of California, basing jurisdiction on diversity of citizenship. The Smiths alleged that Dr. Marshall's negligence during the delivery caused Dominique's injuries.[1]

The Government intervened and sought to have itself substituted for Dr. Marshall as the defendant pursuant to the Gonzalez Act, 10 USC § 1089 [10 USCS § 1089]. The Gonzalez Act provides that in suits against military medical personnel for torts committed within the scope of their employment, the Government is to be substituted as the defendant and the suit is to

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proceed against the Government under the FTCA. See §§ 1089(a), (b). The Government also argued that, because the action arose overseas, the FTCA exception excluding recovery for injuries sustained abroad, 28 USC § 2680(k) [28 USCS § 2680(k)], precluded Government liability. Consequently, the Government concluded, the action should be dismissed. The District Court granted the Government's motion for substitution and dismissed the action. See App to Pet for Cert 17a-18a.[2]

[1b] In 1988, while respondents' appeal was pending, Congress enacted the Liability Reform Act as an amendment to the FTCA. Congress took this action in response to our ruling in Westfall v Erwin, 484 US 292, 98 L Ed 2d 619, 108 S Ct 580 (1988), which held that the judicially created doctrine of official immunity does not provide absolute immunity to Government employees for torts committed in the scope of their employment. In Westfall, we ruled that such official immunity would have to be determined on a case-by-case basis, according to whether "the contribution to effective government in particular contexts" from granting immunity "outweighs the potential harm to individual citizens." 484 US, at 299, 98 L Ed 2d 619, 108 S Ct 580. The Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in Westfall. The Act confers such immunity by making an FTCA action against the Government the exclusive remedy for torts committed by Government employ-

1. Respondents brought their claim under California law, Italian law, and "general American principles of law." See Complaint ¶ 19.

2. As an alternative ground for dismissal, the District Court cited respondents' failure to present their claim to the appropriate federal agency within the time required under 28 USC § 2401(b) [28 USCS § 2401(b)]. See App to Pet for Cert 17a-18a.

ees in the scope of their employment.[3]

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[2a] On appeal in the present case, the Government relied on this new statute to support the District Court's dismissal of respondents' action.[4] The Government argued that the Liability Reform Act essentially had the same effect as that which the District Court had found to result from the Gonzalez Act. Because Dr. Marshall's alleged malpractice occurred in the scope of his employment, the Government argued, respondents' action should proceed against it as an FTCA action.[5] The Government further contended that, because of the FTCA exception under § 2680(k) barring recovery for injuries occurring overseas, the District Court's ruling dismissing the suit should be affirmed.

The Ninth Circuit reversed, holding that neither the Gonzalez Act nor the Liability Reform Act required substitution of the Government as the defendant in this suit or otherwise immunized Dr. Marshall from liability. See 885 F2d 650 (1989).[6] With respect to the Liability Reform Act, the

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Ninth Circuit reasoned that although the Act renders a suit against the Government under the FTCA the exclusive remedy for employment-related torts committed by Government employees, the Act applies only when the FTCA in fact provides a remedy. Because § 2680(k) of the FTCA precludes any remedy

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3. Section 5 of the Act provides:
"The remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." 28 USC § 2679(b)(1) [28 USCS § 2679(b)(1)].

4. Pursuant to § 8(b), the Liability Reform Act applies to all proceedings pending on the date of its enactment. 102 Stat 4565-4566, note following 28 USC § 2679 [28 USCS § 2679]. Respondents do not dispute that the Act applies in this case.

5. Under § 6 of the Liability Reform Act, the Attorney General is required to certify that the original defendant (the Government employee) "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 USC § 2679(d)(1) [28 USCS § 2679(d)(1)]. Once certification occurs, the action "shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant." Ibid. Where the Attorney General refuses to issue such certification, the Act permits the employee to seek a judicial determination that he was acting within the scope of his employment. § 2679(d)(3).

6. **[2b]** Following the Liability Reform Act's enactment and the Eleventh Circuit's decision in Newman v Soballe, 871 F2d 969 (1989), the Government withdrew reliance on the Gonzalez Act as a basis for affirming the District Court's ruling. However, Dr. Marshall, appearing pro se, requested the Ninth Circuit to address the applicability of the Gonzalez Act. See Brief for United States 5, n 3. Following the rationale of Newman v Soballe, supra, the Ninth Circuit held that the Gonzalez Act made the FTCA the exclusive remedy only for malpractice committed by stateside military medical personnel and that the Act left foreign-based military medical personnel like Dr. Marshall subject to malpractice liability. See 885 F2d, at 651-654. Because the Government did not raise the Gonzalez Act issue in its petition for certiorari, we need not address that portion of the lower court's ruling that denied Dr. Marshall immunity under the Gonzalez Act. In any event, that question is rendered irrelevant in this case by our holding that the Liability Reform Act confers Dr. Marshall immunity.

against the Government in cases arising from injuries incurred abroad, the Ninth Circuit concluded that respondents' tort claim against Dr. Marshall was not barred by the Liability Reform Act. Id., at 654-655.

[1c, 3a] We granted certiorari, 496 US 924, 110 L Ed 2d 638, 110 S Ct 2617 (1990), to resolve a conflict among the Circuits over whether the Liability Reform Act immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government.[7] We conclude the Act does confer such immunity and therefore reverse.

II

[3b] Section 5 of the Liability Reform Act states that "[t]he remedy" against the Government under the FTCA "is exclusive

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of any other civil action or proceeding for money damages . . . against the employee" and then reemphasizes that "[a]ny other civil action or proceeding for money damages . . . against the employee . . . is precluded." 28 USC § 2679(b)(1) [28 USCS § 2679(b)(1)]. The central question in this case is whether, by designating the FTCA as the "exclusive remedy," § 5 precludes an alternative mode of recovery against a Government employee in cases where the FTCA itself does not provide a means of recovery.

Two provisions in the Liability Reform Act confirm that § 5 makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability. The first is § 6 of the Act. As noted, see n 5, supra, § 6 directs the Attorney General in appropriate tort cases to certify that a Government employee named as defendant was acting within the scope of his employment when he committed the alleged tort. Section 6 also provides that the suit "shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA] and shall be subject to the *limitations and exceptions* applicable to those actions." 28 USC § 2679(d)(4) [28 USCS § 2679(d)(4)] (emphasis added). One of these "exceptions"—expressly designated as such under § 2680—is the provision barring Government liability for torts "arising in a foreign country." § 2680(k). The "limitations and exceptions" language in § 6 of the Liability Reform Act persuades us that Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether.

[3c, 4] The second basis of our interpretation arises from the express preservations of employee liability in § 5. Section 5 declares that the FTCA is *not* the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings: (1) a Bivens action,[8]

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seeking damages for a constitutional

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7. The First, Fifth and Tenth Circuits all have held that the Liability Reform Act applies even when an FTCA exception precludes liability against the Government. See Nasuti v Scannell, 906 F2d 802, 810, n 14 (CA1 1990); Mitchell v Carlson, 896 F2d 128 (CA5 1990); Aviles v Lutz, 887 F2d 1046 (CA10 1989). The Eleventh Circuit has taken the opposite position. See Newman v Soballe, supra, at 971.

8. See Bivens v Six Unknown Fed. Narcotics Agents, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971).

violation by a Government employee; or (2) an action under a federal statute that authorizes recovery against a Government employee. See § 2679(b)(2). Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." Andrus v Glover Construction Co., 446 US 608, 616-617, 64 L Ed 2d 548, 100 S Ct 1905 (1980).[9]

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[5a] The Ninth Circuit based its contrary construction of the Liability Reform Act on one of the Act's specialized provisions. Section 9 of the Act provides that the Tennessee Valley Authority (TVA) shall be substituted as defendant in any suit against a TVA employee arising from "act[ions] within the scope of his office or employment," 16 USC § 831c-2(b)(1) [16 USCS § 831c-2(b)(1)], and that an action against the TVA is "ex[c]lusive of any other civil action or proceeding," 16 USC § 831c-2(a)(1) [16 USCS § 831c-2(a)(1)]. Under the TVA exception to the FTCA, 28 USC § 2680*(l)* [28 USCS § 2680*(l)*], the Government may not be held liable for any claim arising from the TVA's activities. The Ninth Circuit inferred from the enactment of § 9 that Congress must have expected that § 5 would *not* shield TVA employees from liability where suit against the United States was precluded by § 2680*(l)*. See 885 F2d, at 655. And because only TVA employees were singled out for a special grant of immunity, the court concluded that all other Government employees must remain subject to liability where the FTCA precludes suit against the United States. See ibid.

The Ninth Circuit's analysis rests on a misunderstanding of the purpose and effect of § 9. By its terms, § 9 does not invest TVA employees

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9. [3d] The legislative history fully supports our construction. In particular, the House Committee Report provides:

"The 'exclusive remedy' provision . . . is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents actual recovery. Thus, *any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, USC[,] [28 USCS § 2680] also is precluded against an employee* in his or her estate." HR Rep No. 100-700, p 6 (1988) (emphasis added).

The Ninth Circuit deemed the Report "internally inconsistent," 885 F2d, at 656, because of other language in the Report stating that "[u]nder [the Liability Reform Act], no one who previously had the right to initiate a lawsuit will lose that right," HR Rep, supra, at 7. The Ninth Circuit understood this passage to suggest that Congress did not intend to narrow existing rights of recovery. However, this language must be read in conjunction with a preceding sentence in the Report, which states that the Act "contains provisions to ensure that no one is unfairly affected by [the Act's] procedural ramifications" and that, where "an injury has occurred before [the Act] is enacted, but no lawsuit has yet been filed . . . , the claimant will have to pursue a remedy against the United States, not against the employee." Ibid. When read in context, the passage relied on by the Ninth Circuit indicates that those with existing lawsuits would be permitted to continue to prosecute them by substituting the Government for the employee. The passage supports only the conclusion that the Liability Reform Act preserved the *procedural* right to initiate an action. It does not suggest that the Act did not narrow existing *substantive* rights of recovery.

with more immunity than § 5 affords other Government employees. Rather, § 9 provides merely that a suit against *the TVA,* 16 USC § 831c-2(a)(1) [16 USCS § 831c-2(a)(1)], rather than one against *the United States,* 28 USC § 2679(b)(1) [28 USCS § 2679(b)(1)], shall be the exclusive remedy for the employment-related torts of TVA employees. This adjustment of the Liability Reform Act's immunity scheme is perfectly sensible, for although the United States may not be held liable for the TVA's activities, the TVA itself "[m]ay sue and be sued in its corporate name." 16 USC § 831c(b) [16 USCS § 831c(b)]. Courts have read this "sue or be sued" clause as making the TVA liable to suit

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in tort, subject to certain exceptions. See, e.g., Peoples Nat. Bank of Huntsville, Ala. v Meredith, 812 F2d 682, 684-685 (CA11 1987); Queen v Tennessee Valley Authority, 689 F2d 80, 85 (CA6 1982), cert denied, 460 US 1082, 76 L Ed 2d 344, 103 S Ct 1770 (1983). In our view, the most plausible explanation for § 9 is that, in view of lower court cases establishing the TVA's own tort liability independent of the FTCA, Congress decided to clarify that the TVA should be substituted in suits brought against TVA employees.

[3e, 5b] Seen in this light, the enactment of § 9 supports no inference either way on the scope of § 5 immunity when suit against the United States is precluded under the FTCA. Both the plain language and legislative history of § 9 indicate that the provision was intended to give TVA employees the *same* degree of immunity as § 5 gives other Government employees. Compare 28 USC § 2679(b)(1) [28 USCS § 2679(b)(1)], with 16 USC § 831c-2(a)(1) [16 USCS § 831c-2(a)(1)]. See also 134 Cong Rec 31054 (1988) (remarks of Sen. Heflin). But because the scope of immunity conferred to employees is the same, § 9 has no bearing upon whether Congress viewed § 5 as protecting Government employees from liability when suit against the United States is precluded under the FTCA.[10]

III

A

[1d, 6] In support of the decision below, respondents advance reasoning not relied upon by the Ninth Circuit. They invoke the well-established principle of statutory interpretation that implied repeals should be avoided. See, e.g., Randall v

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Loftsgaarden, 478 US 647, 661, 92 L Ed 2d 525, 106 S Ct 3143 (1986) (" 'repeals by implication are not favored' " (citations omitted)). Respondents contend that the Government's construction of the Liability Reform Act precluding tort liability for Dr. Marshall results in an implied repeal of the Gonzalez Act, 10 USC § 1089 [10 USCS § 1089], which regulates suits against military medical personnel. We disagree.

The Gonzalez Act is one of a series of immunity statutes enacted prior to the Liability Reform Act that

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10. **[5c]** We note, moreover, that Congress included within § 9 a provision parallel to that under § 5 preserving employee liability for Bivens actions. See 16 USC § 831c-2(a)(2) [16 USCS § 831c-2(a)(2)]. Likewise, § 9 contains language parallel to the "limitations and exceptions" language within § 6. See 16 USC § 831c-2(b)(4) [16 USCS § 831c-2(b)(4)] (indicating that action against TVA under § 9 "shall be subject to the limitations and exceptions applicable to" actions against the TVA generally).

were designed to protect certain classes of Government employees from the threat of personal liability.[11] For torts committed by military medical personnel within the scope of their employment, the Gonzalez Act provides that a suit against the Government under the FTCA is the exclusive remedy. 10 USC § 1089(a) [10 USCS § 1089(a)].[12]

[499 US 171]

Two Courts of Appeals, including the Ninth Circuit in the decision below, have held that the Gonzalez Act's grant of absolute immunity from suit protects only military medical personnel who commit torts within the United States and not those committing torts abroad. See 885 F2d, at 652-654; Newman v Soballe, 871 F2d 969 (CA11 1989). In reaching this conclusion, these courts relied largely on § 1089(f) of Title 10, which permits agency heads to indemnify or insure foreign-based military medical personnel against liability for torts committed abroad while in the scope of their employment.[13] The Ninth and Eleventh Circuits construe § 1089(f) to limit the protection available to foreign-based military medical personnel to indemnification or insurance, instead of the immunity that is otherwise available to them when stationed within the United States.[14] Under this interpretation, the Gonzalez Act would not preclude respondents from suing Dr. Marshall directly in a United States court. Respondents contend that extending the Liability Reform Act to foreign-

11. The Gonzalez Act was passed in response to the decision in Henderson v Bluemink, 167 US App DC 161, 511 F2d 399 (1974), which held that an Army physician did not have absolute immunity from suit for alleged malpractice committed within the scope of his employment. See S Rep No. 94-1264, p 4 (1976). Similar pre-immunity statutes were enacted for other medical personnel employed by the Government, including those in the State Department, see 22 USC § 2702 [22 USCS § 2702], the Veterans' Administration, see 38 USC § 4116 [38 USCS § 4116], and the Public Health Service, see 42 USC § 233 [42 USCS § 233]. Another immunity statute was enacted to shield Defense Department attorneys from claims of legal malpractice. See 10 USC § 1054 [10 USCS § 1054]. Finally, before it was expressly repealed by the superseding provisions of the Liability Reform Act, the Federal Drivers Act, 28 USC § 2679(b)-(e) (1982 ed) [28 USCS § 2679(b)-(e)], made the FTCA the exclusive remedy for torts committed by Government employees while operating a motor vehicle within the scope of their employment.

12. Section 1089(a) provides:
"The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding."

13. Section 1089(f) provides:
"The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country . . . ."

14. See also Jackson v Kelly, 557 F2d 735, 740-741 (CA10 1977) (endorsing this view in dictum). But cf. Powers v Schultz, 821 F2d 295 (CA5 1987) (reasoning that § 1089(f)'s indemnify-or-insure language applies only when foreign-based personnel are sued in foreign courts and that such personnel remain immune from suit in a United States court).

based military medical personnel therefore would effect an implied repeal of their "Gonzalez Act remedy." See Brief for Respondents 8, 33, 46.

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[1e, 7a] We reject the last step in respondents' argument. For purposes of this case, we need not question the lower court's determination that the Gonzalez Act would not immunize Dr. Marshall from a malpractice action brought under state or foreign law. Even if the lower court properly interpreted the Gonzalez Act, it does not follow, however, that application of the Liability Reform Act to an action founded on state or foreign law effects a "repeal" of the Gonzalez Act. The Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs. What respondents describe as their "Gonzalez Act remedy" is in fact a state- or foreign-law remedy that would not be foreclosed by Gonzalez Act immunity. Consequently, the rule disfavoring implied repeals simply is not implicated by the facts of this case, because the Liability Reform Act does not repeal anything *enacted* by the Gonzalez Act. The Liability Reform Act *adds* to what Congress created in the Gonzalez Act, namely protection from liability for military doctors. Respondent's rights, on the other hand, arise solely out of state or foreign law. Because Congress did not create respondents' rights, no implied repeal problem arises when Congress limits those rights.[15]

B

[1f, 8] Respondents next raise a second and slightly different argument involving the Gonzalez Act. They contend that the Liability Reform Act was meant to apply solely to those Government employees not already protected from tort liability in some fashion by a pre-existing federal immunity

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statute. Under respondent's construction of the Act, military medical personnel and other Government employees who were already protected by other statutes, see n 11, supra, cannot now benefit from the more generous immunity available under the Liability Reform Act. In our view, such a construction is inconsistent with Congress' purpose in enacting the Liability Reform Act.

The Liability Reform Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not. Section 5 states that, with respect to a tort committed by "*any* employee of the Government" within the scope of employment, the FTCA provides the exclusive remedy. See 28 USC § 2679(b)(1) [28 USCS § 2679(b)(1)] (emphasis added). No language in § 5 or elsewhere in the statute purports to restrict the phrases "any employee of the Government," as respondents urge, to reach only employees not protected from liability

15. **[7b]** The dissent contends that we have rendered "virtually meaningless" the insure-or-indemnify clause of § 1089(f) of the Gonzalez Act by holding that the Liability Reform Act bars any malpractice action in state or federal court against a foreign-based military physician. See post, at 176-177, 113 L Ed 2d, at 151. This is not true. In the wake of the Liability Reform Act, insurance or indemnification against malpractice suits in *domestic* courts is no longer needed, but § 1089(f) still serves to protect foreign-based military personnel against malpractice suits in *foreign* courts. See Powers v Schultz, 821 F2d, at 297.

by another statute. When Congress wanted to limit the scope of immunity available under the Liability Reform Act, it did so expressly, as it did in preserving employee liability for Bivens actions and for actions brought under a federal statute authorizing recovery against the individual employee. § 2679(b)(2); see also supra, at 167, 113 L Ed 2d, at 144-145. In drafting the Liability Reform Act, Congress clearly was aware of the pre-Act immunity statutes. See HR Rep 100-700, p 4 (1988) (citing these statutes, including the Gonzalez Act). We must conclude that if Congress had intended to limit the protection under the Act to employees not covered under the pre-Act statutes, it would have said as much.[16]

C

[1g] Finally, respondents argue that their claim falls within one of the two express exceptions under the Liability Reform

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Act—the exception permitting suits "brought for a violation of a statute of the United States under which such action against an individual [employee] is otherwise authorized." § 2679(b)(2)(B). Respondents assert that they have satisfied both conditions set forth in this exception. They contend that (1) their claim against Dr. Marshall is "authorized" by the Gonzalez Act and that (2) because the Gonzalez Act permits suits against military doctors for negligence in certain instances, such claims of negligence constitute claims of a Gonzalez Act "violation." We need not decide whether a tort claim brought under state or foreign law could be deemed authorized by the Gonzalez Act, for we find that respondents' second argument—that a claim for malpractice involves "a violation of" the Gonzalez Act—is without merit. Nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not "violate" the Gonzalez Act.

The dissent disagrees. According to the dissent, unless § 2679(b)(2)(B) "was intended to preserve the Gonzalez Act remedy, it was essentially without purpose." Post, at 183, 113 L Ed 2d, at 155. However, the dissent never attempts to square this assertion with the plain language of § 2679(b)(2)(B), which permits only those suits against Government employees "brought for a *violation of a statute of the United States* under which such action against an [employee] is otherwise authorized" (emphasis added). At no point does the dissent indicate how a military physician's malpractice under state or foreign law could be deemed a "violation" of the Gonzalez Act. Nor can the dissent avoid this obstacle merely by invoking the canon of statutory construction that every provision of a law should be given meaning. See post, at 183, 113 L Ed 2d, at 155, and n 8. It is true that the legislative history fails to disclose (and neither we nor the dissent has attempted to discover) what cause(s) of action Congress sought to preserve when it enacted § 2679(b)(2)(B), but a malpractice suit alleging a

16. The House Committee Report echoes the all-encompassing language of the statute: "The 'exclusive remedy' provision . . . is intended to substitute the United States as the solely permissible defendant in *all* common law tort actions against Federal employees who acted in the scope of employment." HR Rep No. 100-700, at 6 (emphasis added).

"violation" of the Gonzalez
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Act cannot have been one of them. The Gonzalez Act simply does not impose any duties of care upon military physicians that could be violated.

[1h, 3f] The dissent resists this conclusion because it is impressed by "Congress' general intent, expressed throughout the hearings and in the House Report, that [the Liability Reform Act] not curtail any pre-existing remedies of tort victims." Post, at 183, 113 L Ed 2d, at 155. The truth is, however, that the legislative history reveals considerably less solicitude for tort plaintiffs' rights than the dissent suggests. As we have already noted, see n 9, supra, the House Report expressly warned that, under the Liability Reform Act, "*any* claim against the government that is precluded by [FTCA] exceptions"—which obviously would include claims barred by the exception for causes of action arising abroad—"also is precluded against an employee." HR Rep 100-700, at 6 (emphasis added). This congressional intent was clearly implemented in § 5 of the Act, and we are obliged to give it effect.

IV

For the reasons set forth above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

SEPARATE OPINION

Justice **Stevens,** dissenting.

The Department of Defense (Department) provides medical and dental care for families of service personnel stationed abroad. Subsection (f) of the Gonzalez Act authorizes the Department to indemnify its health care personnel serving overseas in the event that they are sued for malpractice.[1]
[499 US 176]
Regulations issued pursuant to subsection (f) make the United States the real party in interest in such a tort action.[2] The

1. The Gonzalez Act, also known as the Medical Malpractice Immunity Act, authorizes indemnification as follows:

"(f) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury." 90 Stat 1986(f), as amended, 10 USC § 1089(f) [10 USCS § 1089(f)].

Another subsection makes the same indemnification arrangement available to members of the National Aeronautics and Space Administration. See 90 Stat 1989, 42 USC § 2458a(f) [42 USCS § 2458a(f)].

2. According to the Navy Department's regulations:

"6. Extent of Protection. Reference (b) [the Gonzalez Act] extends coverage within the United States and its possessions by making suit against the United States under the Federal Tort Claims Act the exclusive remedy for an injured party. Where the Federal Tort Claims Act does not apply (as, for example, where the acts giving rise to the claim occurred outside the United States), coverage is provided by allowing the Secretary of Defense to hold harmless or provide liability insurance for health care personnel.

regulations provide victims of malpractice with a remedy against the United States, even in cases in which the nominal, individual defendant may have no assets.

This Gonzalez Act remedy protects both doctors and patients involved in malpractice claims arising out of the performance of health care services for American military

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personnel and their dependents assigned to duty in foreign countries. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act) that the Court construes today says nothing about this special situation; yet, the effect of today's decision is to render subsection (f) of the Gonzalez Act virtually meaningless. There is nothing in the legislative history of the Liability Reform Act to indicate that Congress intended this result. On the contrary, there is strong evidence in both the legislative history, and in the language of §§ 2 and 5(b)(2)(B) of the statute, that Congress intended to preserve pre-existing remedies. This point is clarified by examining the two statutes separately and in chronological order.

I

The principal purpose of the Gonzalez Act is succinctly stated in its preamble. It was enacted

> "[t]o provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes." 90 Stat 1985.

To achieve its purpose, Congress simply followed the precedent set by four previous amendments to the Federal Tort Claims Act (FTCA), none of which had curtailed any pre-existing remedies.[3]

"7. Exercise of Authority. By reference (a), the Secretary of Defense delegated to the Secretary of the Navy the authority to hold harmless or provide liability insurance for Navy health care personnel. All persons referred to in paragraph 4 above and in subsection (a) of reference (b) are hereby held harmless for damages resulting from negligent or wrongful acts or omissions while acting within the scope of duties and assigned to duty in a foreign country, or detailed for service with other than a Federal agency, or if the circumstances are such as are likely to preclude remedy against the United States under the Federal Tort Claims Act, as provided by subsection (f) of reference (b)." Department of the Navy, SECNAV INSTRUCTION 6300.3, JAG:14C (Mar. 14, 1978), App to Brief for Respondents 2a-3a.

3. As the Senate Report explained:
"By making the Federal Tort Claims Act an exclusive remedy, a claimant is forced to sue the United States for damages rather than a government employee in his personal capacity. At least four existing statutes make the Federal Tort Claims Act an exclusive remedy in order to protect a certain class of government employee from personal liability.

"In 1961 the Government Driver's Act (Public Law 87-258) made the Federal Tort Claims Act the exclusive remedy for damages sustained as a result of the negligent operation of a motor vehicle by a federal driver acting within the scope of his employment. The result was to protect federal employees in their individual capacity from tort liability arising from the operation of motor vehicles.

"In 1965, Congress enacted a bill patterned after the Government Driver's Act which protected medical personnel of the Veterans' Administration for individual tort liability from malpractice when acting within the scope of their employment (Public Law 89-311).

"Similar legislation making the Federal Tort Claims Act the exclusive remedy for malpractice was enacted in 1970 to immunize medical personnel of the Public Health Service from personal liability arising out of

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For claims not covered by the FTCA, such as for those claims arising in foreign countries, the Gonzalez Act authorized medical personnel to be insured or indemnified by the Federal Government. See n 1, supra. By that arrangement, Congress protected Government doctors from personal liability for services performed in the course of their overseas duties, and at the same time, preserved the common-law remedy for American victims of medical malpractice.

The Court does not disagree with this interpretation of the Gonzalez Act, see ante, at 170-171, 113 L Ed 2d, at 146-148, or with the Court of Appeals' conclusion that respondent's claim was viable prior to the enactment of the Liability Reform Act in 1988. See ante, at 172, 113 L Ed 2d, at 148. Thus, the question is whether the Liability Reform Act withdrew the remedy for malpractice claims arising outside of the United States that had been expressly preserved by subsection (f) of the Gonzalez Act.

II

The Liability Reform Act was a direct response to this Court's decision in Westfall v Erwin, 484 US 292, 98 L Ed 2d 619, 108 S Ct 580 (1988).

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In Westfall, we resolved a conflict among the Courts of Appeals on the question whether conduct by federal officials must be discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability. Id., at 295, 98 L Ed 2d 619, 108 S Ct 580. We held unanimously that nondiscretionary conduct was not entitled to such immunity. Id., at 297, 98 L Ed 2d 619, 108 S Ct 580.

Congress enacted the Liability Reform Act to protect all federal employees from the risk of personal liability that was thought to have been created by Westfall. Congress was particularly concerned that lower level employees, the rank and file "who are least likely to exercise discretion in carrying out their duties," were among those who were most likely to be affected by the Westfall decision. HR Rep No. 100-700, p 3 (1988).

Section 2 of the Liability Reform Act contains a detailed statement of Congress' reasons for enacting the statute.[4] Congress summarized its purpose as follows:

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performance of their medical duties (Public Law 91-623).

"More recently, the Foreign Relations Authorization Act of fiscal year of 1977 (Public Law 94-350) immunized medical personnel of the State Department from personal liability for medical malpractice.

"In all essential respects these four statutes are similar. Each statute abolished old rights recognized by the common law to obtain the legislative object of protecting certain federal employees from suit in their individual capacities.

"HR 3954 is modeled after these statutes." S Rep No. 94-1264, p 3 (1976).

4. In § 2 of Pub L 100-694, 102 Stat 4563, Congress set forth the findings and purposes of the Liability Reform Act:

"(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

. . . . .

"(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

"(5) This erosion of immunity of Federal employees from common law tort liability has

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"It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, *while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.*" 102 Stat 4564, note following 28 USC § 2671 [28 USCS § 2671] (emphasis added).

Notably, neither that statement, nor anything in the legislative history of the Act, reveals any intent on the part of Congress to limit the scope of pre-existing remedies available to victims of torts committed by federal employees.[5]

There were two recurring themes throughout the hearings on the bill that gave rise to the Liability Reform Act. One theme was that this legislation was not intended to curtail any existing remedies already available to tort victims against federal employees,[6] and the other was that Congress

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sought to protect all federal employees from suit by substituting the United States for the individual tortfeasor as the responsible party—a substitution that would normally benefit the injured party who would no longer have to worry about whether he or she would be able to collect the judgment. The bill was supported by the Department of Justice and two unions representing federal employees.

Members of Congress not only ar-

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created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

. . . . .

"(7) In its opinion in Westfall v Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful." 102 Stat 4563-4564, note following 28 USC § 2671 [28 USCS § 2671].

5. Senator Grassley, one of the sponsors of the legislation explained:

"As my colleagues know, the FTCA has generally worked well over the past four decades in providing fair and expeditious compensation to persons injured by the common law torts of Federal employees. This bill, by covering Westfall-type cases under the FTCA, assures that victims of common law torts of Federal employees will be fairly compensated. At the same time, it provides a needed measure of employee protection from personal liability.

"Mr. President, I would like to emphasize that this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims. Although this too is an area of concern to me—and I have introduced corrective legislation in the past—the bill that we pass today has no impact on these cases, which can continue to be brought against individual Government officials." 134 Cong Rec 29933 (1988).

6. Thus, a representative of the Department of Justice testified:

"HR 4358 would do nothing more than extend the protection now enjoyed by doctors, drivers, and DoD attorneys to all federal employees. It also will ensure equitable and consistent treatment for persons injured by federal conduct, without regard to the status of the employee whose actions are alleged to have caused the injury." Hearings on HR 4358 et al. before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 100th Cong, 2d Sess, 76 (1988) (hereinafter House Hearings).

The point was reiterated by others during the hearings and debate. See id., at 34 ("In no way, in no way at all, does this measure infringe or diminish any legal rights of individuals") (statement of Rep. Wolf); id., at 44 ("[W]e want to protect the employees without diminishing the rights of anyone who might be injured") (statement of Chairman Frank); 134 Cong Rec 15963 (1988) ("Other remedies under other acts, Civil Rights Act, are not affected at all") (statement of Chairman Frank).

ticulated their intent to preserve the scope of existing remedies during the hearings, but also reinforced that intent by amending the original bill to include § 5(b)(2), 28 USC § 2679(b)(2) [28 USCS § 2679(b)(2)]. As amended, § 5(b)(2) provides:

> "(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
>
> "(A) which is brought for a violation of the Constitution of the United States, or
>
> "(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 USC § 2679(b)(2) [28 USCS § 2679(b)(2)].

As to § 5(b)(2)(A), Congress made explicit throughout the hearings its intent to exclude constitutional violations from the Liability Reform Act's coverage.[7] The Justice Department endorsed that view:

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>
> "It also is important to emphasize the [Liability Reform Act] would apply only to cases alleging injury caused by ordinary common law tortious conduct. By common law tortious conduct, we mean not just causes of action based upon the "common" or case law of the several states, but also causes of action codified in state statutes that permit recovery for negligence, such as, for example, wrongful death statutes. The term does not include, and [the Liability Reform Act] is not intended to apply to, cases that allege violations of constitutional rights, or what commonly are known as Bivens cases. Persons alleging constitutional torts will, under [the Liability Reform Act], remain free to pursue a remedy against the individual employee if they so choose." House Hearings 78.

The Justice Department explained that the issue of constitutional torts was a controversial one, and one that was not affected by the Court's decision in Westfall because Westfall was limited to common-law torts. Id., at 79. Members of Congress stressed that constitutional torts would not be encompassed by this legislation, and thus, there was no need to address the issue. See, e. g., id., at 40, 195. During the hearings, however, there was some suggestion that an action could involve both a common-law tort and a constitutional violation. See, e. g., id., at 42, 127, 173. In response to this concern, Congress apparently added § 5(b)(2)(A) to make explicit what it had assumed all along: that victims of constitutional violations would remain free to pursue a remedy against the individual employee if they chose to do so.

As to § 5(b)(2)(B), Congress provided no specific explanation for its inclusion, other than its general concern with preserving all pre-existing remedies available to victims of torts committed by federal employees. Just as Congress added § 5(b)(2)(A) to ensure that constitutional torts would not be included within the scope of the Liability Reform Act, similarly, it must have added § 5(b) (2)(B) to ensure that pre-existing remedies protected by a statute would not be affected

> [499 US 183]

as well. Congress did not need to add this amendment, any more than it

7. See, e. g., House Hearings 40, 58, 127, 195.

needed to add § 5(b)(2)(A), because just as constitutional torts are, for the most part, outside the realm of common-law torts, similarly statutory violations are also outside the realm of common-law torts. Nevertheless, this action is consistent with Congress' general intent, expressed throughout the hearings and in the House Report, that it not curtail any pre-existing remedies of tort victims. Unless the amendment was intended to preserve the Gonzalez Act remedy, it was essentially without purpose—a result Congress clearly could not have intended.

The Court's reading of the Liability Reform Act makes § 5(b)(2)(B) superfluous.[8] Indeed, the Court never says what kind of statutory violation § 5(b)(2)(B) is meant to protect, nor does Congress provide any specific guidance. To avoid the Court's result of turning this subsection into surplusage, it should be construed to accomplish the purpose repeatedly identified in the hearings, which is to avoid any interpretation of the Act that would limit the scope of pre-existing common-law remedies. This purpose was unequivocally identified in the House Report on the bill. It explains: "Under HR 4612, no one who previously had the right to initiate a lawsuit will lose that right." HR Rep No. 100-700, at 7.[9]

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The description of § 5 in the section-by-section analysis of the Liability Reform Act is consistent with the view that it was intended to describe the remedy available to a plaintiff in a common-law cause of action for malpractice arising in foreign countries that was specifically authorized by subsection (f) of the Gonzalez Act. The House Report states that the section "would make it clear that the remedy provided in this legislation does not extend to constitutional torts or to *causes of action specifically authorized to be brought against an individual by another statute of the United States.*" Id., at 8 (emphasis added).

The Court argues that the "Gonzalez Act remedy" has not been impliedly repealed because "[t]he Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs." Ante, at 172, 113 L Ed 2d, at 148. This is not strictly accu-

8. The Court's approach today runs counter to the well-established rule that meaning should be attributed to each subsection of a statute. See United States v Morton, 467 US 822, 828, 81 L Ed 2d 680, 104 S Ct 2769 (1984); see also 2A C. Sands, Sutherland on Statutory Construction § 46.06, p 104 (rev 4th ed 1984) ("A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant") (footnotes omitted).

9. The Court today attempts to explain the House Report's language away by claiming that because it appears in a section pertaining to implementation of the Act, it says nothing more than that those plaintiffs who had actions pending would be permitted to pursue them by substituting the Government for the individual employee. See ante, at 167-168, n 9, 113 L Ed 2d, at 145. However, similar language also appears in the House Report *before* any discussion of what would happen during the transition period. According to the House Report, the Liability Reform Act "does not change the law, as interpreted by the Courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal statutes." HR Rep No. 100-700, p 7 (1988). Such language indicates that Congress was concerned not just with preserving procedural rights, as the Court would have it, but also with preserving existing substantive rights.

rate because subsection (f) of the Gonzalez Act, as implemented by regulation, did provide malpractice plaintiffs with an important remedy against the United States as the real party in interest that they did not previously have.[10] Moreover, this

[499 US 185]

provision of the Gonzalez Act amounted to an express preservation of a common-law remedy. Because § 5(b)(2)(B) of the Liability Reform Act is otherwise virtually meaningless,[11] I believe it should be construed to preserve that remedy. Otherwise, without any justification for doing so, the Liability Reform Act has silently repealed this provision of the Gonzalez Act.

Under the Court's holding, the Liability Reform Act has closed the door to all federal and state courts for American victims of malpractice by federal health care personnel stationed abroad.[12] No legislative purpose is achieved by that holding because these personnel are already protected from personal liability by the Gonzalez Act and the indemnity regulation. The only significant effect of this holding is to deprive an important class of potential plaintiffs of their pre-existing judicial remedy. Respondents, and other plaintiffs like them, are now precluded from pursuing their pre-existing

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common-law claims against an allegedly negligent doctor working abroad, even though the doctor is indemnified by Federal Government. I cannot believe that Congress intended that re-sult . I am therefore persuaded that § 5 (b)(2)(B) should be read in a way that prevents it from being nothing more than a meaningless appendage and allows it to fulfill its

10. The Eleventh Circuit recognized that subsection (f) could not be ignored: "Because subsection (f) was written into the Gonzalez Act, we are required to give it meaning." Newman v Soballe, 871 F2d 969, 974 (1989). The Tenth Circuit also acknowledged, albeit in dicta, that subsection (f) of the Gonzalez Act provided an important remedy:
"The purpose of [subsection (f)] is to provide a method for the assumption by the government of responsibility for damage claims against its military medical personnel arising from medical care given in foreign countries in the scope of their employment. Behind it is the desire to protect military medical personnel from the ever-present danger of personal liability . . . while preserving a means for compensating malpractice victims for their injuries. . . . Instead of granting military medical personnel practicing in foreign countries absolute immunity from suit for acts within the scope of their employment, Congress elected to have the government protect them through indemnification or insurance. The effect of this approach rather than absolute immunity is to ensure a remedy to victims of malpractice by military medical personnel assigned to a foreign country." Jackson v Kelly, 557 F2d 735, 740-741 (CA10 1977).

11. The theoretical possibility of litigation in a foreign court, see ante, at 172, n 15, 113 L Ed 2d, at 148, was never even mentioned in the legislative history of either the Gonzalez Act or the Liability Reform Act.

12. The only remedy that remains available to respondents after the Court's decision today is the possibility of a private bill. See Office of Personnel Management v Richmond, 496 US 414, 110 L Ed 2d 387, 110 S Ct 2465 (1990). Ironically, the Court, by its restrictive reading, now leaves families of service personnel who have been injured by federal health workers in foreign countries with little choice but to seek private bills in order to receive compensation; this is the very policy that Congress sought to avoid when it enacted the FTCA over 40 years ago. At the time of the FTCA's enactment, Congress sought to rectify the shortcomings of a system that was "unduly burdensome to the Congress" and was "unjust to the claimants" because it did not "accord to injured parties a recovery as a matter of right but base[d] any award that may be made on considerations of grace." HR Rep No. 1287, 79th Cong, 1st Sess, 2 (1945). Congress intended the FTCA to "establish a uniform system" to replace the existing system of private bills. Id., at 3.

intended purpose of preserving pre-existing claims.[13]

In Westfall v Erwin, 484 US 292, 98 L Ed 2d 619, 108 S Ct 580 (1988), we said that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context" and we suggested that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." Id., at 300, 98 L Ed 2d 619, 108 S Ct 580. Today, the Court, by deciding that a section of Congress' handiwork is a nullity, once again invites Congress to step in and "provide guidance."

I respectfully dissent.

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13. In response to this dissent, the Court has restated its argument that respondent did not "violate" the Gonzalez Act. See ante, at 174, 113 L Ed 2d, at 149. As a matter of pure grammar, the Court is, of course, correct. It nevertheless remains true that this literal reading of the Liability Reform Act fails to answer two critical questions: (1) What legislative purpose is served by depriving malpractice victims, such as petitioner, of their Gonzalez Act remedy? (2) If § 5(b)(2)(B) does not preserve that remedy, then what was its purpose? If forced to choose between an assumption that Congress used imperfect grammar to achieve a benign purpose identified in the legislative history and an assumption that it inadvertently achieved a heartless purpose disclaimed in the legislative history, I have no difficulty in choosing the former.

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al., Petitioners

v

JOHNSON CONTROLS, INC.

499 US 187, 113 L Ed 2d 158, 111 S Ct 1196

[No. 89-1215]

Argued October 10, 1990. Decided March 20, 1991.

Decision: Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.) held to bar employer from excluding fertile females from jobs entailing risk of harm to fetuses which females might conceive.

SUMMARY

Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a woman subjected to such exposure. After eight employees of an employer, in whose battery manufacturing process lead was a primary ingredient, became pregnant while maintaining blood-lead levels in excess of the level that appeared to be the critical level noted by the Occupational Safety and Health Administration (OSHA) for a woman who was planning to have a family, the employer announced a policy barring all women, except those whose inability to bear children was medically documented, from jobs involving exposure or potential exposure to lead at a level exceeding OSHA standards. A group of employees who had been affected by the employer's fetal-protection policy filed in the United States District Court for the Eastern District of Wisconsin a class action challenging the policy as sex discrimination that violated Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.)—which, in § 703(a) of the Act (42 USCS § 2000e-2(a)), prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions. The District Court granted summary judgment for the employer (680 F Supp 309). Applying a three-part "business necessity" defense, the District Court held that an acceptable alternative policy that would protect a fetus had not been established, and that, in view of the court's disposition of the case by applying the business necessity

Briefs of Counsel, p 750, infra.

defense, the court did not have to undertake a bona fide occupational qualification (BFOQ) analysis. The United States Court of Appeals for the Seventh Circuit affirmed the District Court judgment (886 F2d 871). Holding that the proper standard for evaluating the fetal-protection policy was the three-step business necessity inquiry—whether (1) there is a substantial health risk to the fetus, (2) transmission of the hazard to the fetus occurs only through women, and (3) there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus—and that the burden of persuasion was on the plaintiffs with respect to all three steps of the inquiry, the Court of Appeals concluded that the employer was entitled to summary judgment based on the business necessity defense. Moreover, the Court of Appeals concluded that even based on the BFOQ defense, the employer was entitled to summary judgment, because (1) industrial safety was part of the essence of the employer's business, and (2) the fetal-protection policy was reasonably necessary to further industrial safety.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BLACKMUN, J., joined by MARSHALL, STEVENS, O'CONNOR, and SOUTER, JJ. it was held that the employer's fetal-protection policy was sex discrimination forbidden under Title VII, because (1) the policy was facially discriminatory by requiring only a female employee to prove that she was not capable of reproducing; (2) under the Pregnancy Discrimination Act of 1978 (PDA) (42 USCS § 2000e(k)), which provides that for purposes of Title VII, sex discrimination includes discrimination on the basis of pregnancy, the employer's choice to treat all female employees as potentially pregnant evinced sex discrimination; (3) the beneficence of the employer's purpose did not undermine the conclusion that the employer's policy was sex discrimination under § 703(a) and thus could be defended only as a BFOQ; and (4) the policy did not come within the BFOQ exception under § 703(e)(1) of Title VII (42 USCS § 2000e-2(e)(1))—which allows an employer to discriminate on the basis of sex if sex is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's particular business—since (a) fertile women, according to the record, participated in the manufacture of batteries as efficiently as anyone else, (b) through Title VII, as amended by the PDA, Congress mandated that decisions about the welfare of future children be left to the parents who conceive, bear, support, and raise them, and (c) concerns about the next generation were not part of the essence of the employer's business.

WHITE, J., joined by REHNQUIST, Ch. J., and KENNEDY, J., concurring in part and concurring in the judgment, (1) agreed with the court that on the record before the court, summary judgment in favor of the employer was improper; but (2) expressed the view that the BFOQ exception is not so narrow that it could never justify a sex-specific fetal protection policy, because (a) nothing in the exception's language indicates that it could never support such a policy, (b) compliance with Title VII will not necessarily preclude an employer from state tort liability for work-related injuries, (c) prior decisions of the court confirm that the BFOQ defense is broad enough to include cost and safety considerations that could form the basis of a fetal-

protection policy, and (d) the PDA does not restrict the scope of the BFOQ defense.

SCALIA, J., concurring in the judgment, expressed the view that (1) under the PDA (a) even without evidence about the debilitating effect of lead exposure on the male reproductive system, treating women differently on the basis of pregnancy constituted discrimination on the basis of sex, and (b) it was irrelevant whether women placed their fetuses at risk in performing the jobs in question; and (2) the employer's failure to demonstrate a substantial risk of tort liability resulting from allowing fertile women to perform the jobs was alone enough to defeat a tort-based assertion of the BFOQ exception.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

15 Am Jur 2d, Civil Rights §§ 154, 162, 177, 184, 186; 45A Am Jur 2d, Job Discrimination §§ 84-86; 45B Am Jur 2d, Job Discrimination §§ 2019, 2020, 2024

21 Federal Procedure, L Ed, Job Discrimination §§ 50:218, 50:229, 50:239, 50:250.5, 50:256

12 Federal Procedural Forms, L Ed, Job Discrimination §§ 45:81-45:83

5A Am Jur Pl & Pr Forms (Rev), Civil Rights, Forms 117, 119

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21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts; 21 Am Jur Trials 625, Preparation and Trial of Federal Class Actions

42 USCS §§ 2000e(k), 2000e-2(a), 2000e-2(e)(1)

RIA Employment Coordinator ¶¶ EP-18,052, EP-18,120

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L Ed Digest, Civil Rights § 7.7

L Ed Index, Job Discrimination; Pregnancy; Pregnancy Discrimination Act; Sex Discrimination

Index to Annotations, Equal Employment Opportunity; Maternity; Sex Discrimination

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Sex discrimination—Supreme Court cases. 27 L Ed 2d 935.

Exclusion of women from employment involving risk of fetal injury as violative of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.). 66 ALR Fed 968.

What constitutes "business necessity" justifying employment practice prima facie discriminatory under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.). 36 ALR Fed 9.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.) making sex discrimination in employment unlawful. 12 ALR Fed 15.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights § 7.7 — sex discrimination — employment — fetal-protection policy — Title VII of Civil Rights Act of 1964

1a-1g. An employer's policy barring all women, except those whose inability to bear children is medically documented, from jobs involving exposure or potential exposure to lead in the employer's battery manufacturing process—which exposure entails health risks, including the risk of harm to any fetus carried by a woman subjected to such exposure—at a level exceeding Occupational Safety and Health Administration standards for a woman who is planning to have a family, is sex discrimination forbidden under Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.)—which, in § 703(a) of the Act (42 USCS § 2000e-2(a)), prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions—because (1) the policy is facially discriminatory since it requires only a female employee to prove that she is not capable of reproducing; (2) under the Pregnancy Discrimination Act of 1978 (PDA) (42 USCS § 2000e(k)), which provides that for purposes of Title VII, discrimination on the basis of sex includes discrimination on the basis of pregnancy, the employer's choice to treat all female employees as potentially pregnant evinces discrimination on the basis of sex; (3) the beneficence of an employer's purpose does not undermine the conclusion, with which the enforcement policy of the Equal Employment Opportunity Commission is in accord, that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a bona fide occupational qualification (BFOQ); and (4) the employer's fetal-protection policy does not come within the BFOQ exception under § 703(e)(1) of Title VII (42 USCS § 2000e-2(e)(1))—which allows an employer to discriminate on the basis of sex if sex is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's particular business—since (a) fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else, (b) through Title VII, as amended by the PDA, Congress has mandated that decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents or to the courts, and (c) concerns about the next generation cannot be considered a part of the essence of the employer's business.

Civil Rights § 7.7 — sex discrimination — employment — fetal-protection policy — Title VII of Civil Rights Act of 1964

2. In determining whether an employer's policy barring all women, except those whose inability to bear children is medically documented, from jobs involving exposure or potential exposure to lead in the employer's battery manufacturing process—which exposure entails health risks, including the risk of harm to any fetus carried by a woman subjected to such exposure—at a level exceeding Occupational Safety and Health Administration standards for a woman who is planning to have a

family, is sex discrimination forbidden under Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.)—which prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions—the business necessity standard—whether (1) there is a substantial health risk to the fetus, (2) transmission of the hazard to the fetus occurs only through women, and (3) there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus—is more lenient for the employer than is the defense that the policy is a bona fide occupational qualification under § 703(e)(1) of Title VII (42 USCS § 2000e-2(e)(1))—which allows an employer to discriminate on the basis of sex if sex is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's particular business.

Civil Rights § 7.7 — sex discrimination — employment — fetal-protection policy — Title VII of Civil Rights Act of 1964

3. It is incorrect to assume that because the asserted reason—protecting women's unconceived offspring—for an employer's policy barring all women, except those whose inability to bear children is medically documented, from jobs involving exposure or potential exposure to lead in the employer's battery manufacturing process—which exposure entails health risks, including the risk of harm to any fetus carried by a woman subjected to such exposure—at a level exceeding Occupational Safety and Health Administration standards for a woman who is planning to have a family is ostensibly benign, the policy is not sex-based discrimination under Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.), which prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions.

Civil Rights § 7.7 — sex discrimination — employment — pregnancy

4. The Pregnancy Discrimination Act of 1978 (PDA) (42 USCS § 2000e(k)), which provides that for purposes of Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.)—which prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions—discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, or related medical conditions, makes clear that for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex; under the PDA, a classification explicitly based on the potential for pregnancy must be regarded, for Title VII purposes, in the same light as explicit sex discrimination.

Civil Rights § 7.7 — sex discrimination — employment — Title VII of Civil Rights Act of 1964

5. For purposes of Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.)—which prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions—the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with discriminatory effect; whether

an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates, but rather on the explicit terms of the discrimination.

Civil Rights § 7.7; Courts § 775; Statutes §§ 145.4, 147, 164 — sex discrimination — employment — Title VII of Civil Rights Act of 1964 — pregnancy — former Supreme Court decisions

6a, 6b. The language of both § 703(e)(1) of Title VII of the Civil Rights Act of 1964 (42 USCS § 2000e-2(e)(1))—which allows an employer to discriminate on the basis of sex if sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the employer's particular business—and the Pregnancy Discrimination Act of 1978 (PDA) (42 USCS § 2000e(k))—which amended the BFOQ provision by providing that for purposes of Title VII (42 USCS §§ 2000e et seq.), which prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions, discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, or related medical conditions—as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant, unless her reproductive potential prevents her from performing the duties of her job, because (1) with respect to the BFOQ provision, (a) the provision's limitation of permissible sex discrimination to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business prevents the use of general subjective standards and favors an objective, verifiable requirement, (b) by modifying "qualification" with "occupational," Congress narrowed the term to qualifications that affect an employee's ability to do the job, (c) an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business, and (d) the United States Supreme Court's case law makes clear that the safety exception to the provision, under which exception discrimination on the basis of sex because of safety concerns is allowed, is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job; and (2) with respect to the PDA, (a) the language providing that unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes," indicates that women who are either pregnant or potentially pregnant must be treated like others similar in their ability to work, and (b) the legislative history confirms what the language of the PDA compels, since both the House and Senate reports accompanying the legislation indicate that the PDA standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children.

Appeal §§ 1331.5, 1750 — scope of review — what concluded

7a, 7b. On certiorari to determine whether an employer's policy barring all women, except those whose

inability to bear children is medically documented, from jobs involving exposure or potential exposure to lead in the employer's battery manufacturing process—which exposure entails health risks, including the risk of harm to any fetus carried by a woman subjected to such exposure—at a level exceeding Occupational Safety and Health Administration standards for a woman who is planning to have a family is sex-based employment discrimination forbidden under Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.), the United States Supreme Court, which has never addressed privacy-based sex discrimination, shall not do so in this case, because the sex-based discrimination at issue in the case does not involve the privacy interests of the employer's customers; however, nothing in the Supreme Court's discussion in the case of the "essence of the business" test with respect to § 703(e)(1) of Title VII (42 USCS § 2000e-2(e)(1))—which allows an employer to discriminate on the basis of sex if sex is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the employer's particular business—suggests that sex could not constitute a BFOQ when privacy interests are implicated.

Civil Rights §§ 7.7, 63; States, Territories, and Possessions § 18; Torts § 5 — sex discrimination — employment — Title VII of Civil Rights Act of 1964 — pre-emption of state law — defenses

8a, 8b. An employer's tort liability for potential fetal injuries and its potential increased cost in employing fertile women do not preclude a holding that Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.)—which prohibits sex-based classifications in terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions—forbids employers from instituting sex-specific fetal-protection policies, because (1) if, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best, (2) when it is impossible for an employer to comply with both state and federal requirements, the United States Supreme Court has ruled that federal law pre-empts that of the states, (3) Title VII forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace, and (4) the extra cost of employing members of one sex does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. (White, J., Rehnquist, Ch. J., and Kennedy and Scalia, JJ., dissented in part from this holding.)

Appeal § 1092 — issue not raised

9. On certiorari to determine whether an employer's policy barring all women, except those whose inability to bear children is medically documented, from jobs involving exposure or potential exposure to lead in the employer's battery manufacturing process—which exposure entails health risks, including the risk of harm to any fetus carried by a woman subjected to such exposure—at a level exceeding Occupational Safety and Health Administration standards for a woman who is planning to have a family, is sex-

based employment discrimination forbidden under Title VII of the Civil Rights Act of 1964, as amended (42 USCS §§ 2000e et seq.), the United States Supreme Court will not decide whether Title VII preempts state tort law under which the employer might be liable for a potential injury to a fetus, where the employer has not argued that it faces any costs from tort liability.

SYLLABUS BY REPORTER OF DECISIONS

A primary ingredient in respondent's battery manufacturing process is lead, occupational exposure to which entails health risks, including the risk of harm to any fetus carried by a female employee. After eight of its employees became pregnant while maintaining blood lead levels exceeding that noted by the Occupational Safety and Health Administration (OSHA) as critical for a worker planning to have a family, respondent announced a policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the OSHA standard. Petitioners, a group including employees affected by respondent's fetal-protection policy, filed a class action in the District Court, claiming that the policy constituted sex discrimination violative of Title VII of the Civil Rights Act of 1964, as amended. The court granted summary judgment for respondent, and the Court of Appeals affirmed. The latter court held that the proper standard for evaluating the policy was the business necessity inquiry applied by other Circuits; that respondent was entitled to summary judgment because petitioners had failed to satisfy their burden of persuasion as to each of the elements of the business necessity defense under Wards Cove Packing Co. v Atonio, 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115; and that even if the proper evaluative standard was bona fide occupational qualification (BFOQ) analysis, respondent still was entitled to summary judgment because its fetal-protection policy is reasonably necessary to further the industrial safety concern that is part of the essence of respondent's business.

Held: Title VII, as amended by the Pregnancy Discrimination Act (PDA), forbids sex-specific fetal-protection policies.

(a) By excluding women with childbearing capacity from lead-exposed jobs, respondent's policy creates a facial classification based on gender and explicitly discriminates against women on the basis of their sex under § 703(a) of Title VII. Moreover, in using the words "capable of bearing children" as the criterion for exclusion, the policy explicitly classifies on the basis of potential for pregnancy, which classification must be regarded, under the PDA, in the same light as explicit sex discrimination. The Court of Appeals erred in assuming that the policy was facially neutral because it had only a discriminatory effect on women's employment opportunities, and because its asserted purpose, protecting women's unconceived offspring, was ostensibly benign. The policy is not neutral because it does not apply to male employees in the same way as it applies to females, despite evidence about the debilitating effect of lead exposure on the male reproductive system. Also, the absence of a

malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Cf. Phillips v Martin Marietta Corp. 400 US 542, 27 L Ed 2d 613, 91 S Ct 496. Because respondent's policy involves disparate treatment through explicit facial discrimination, the business necessity defense and its burden-shifting under *Wards Cove* are inapplicable here. Rather, as indicated by the Equal Employment Opportunity Commission's enforcement policy, respondent's policy may be defended only as a BFOQ, a more stringent standard than business necessity.

(b) The language of both the BFOQ provision set forth in § 703(e)(1) of Title VII—which allows an employer to discriminate on the basis of sex "in those certain instances where . . . sex . . . is a [BFOQ] reasonably necessary to the normal operation of [the] particular business" —and the PDA provision that amended Title VII—which specifies that, unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes"—as well as these provisions' legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. The so-called safety exception to the BFOQ is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform, and the employer must direct its concerns in this regard to those aspects of the woman's job-related activities that fall within the "essence" of the particular business. Dothard v Rawlinson, 433 US 321, 333, 335, 53 L Ed 2d 786, 97 S Ct 2720; Western Air Lines, Inc. v Criswell, 472 US 400, 413, 86 L Ed 2d 321, 105 S Ct 2743. The unconceived fetuses of respondent's female employees are neither customers nor third parties whose safety is essential to the business of battery manufacturing.

(c) Respondent cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Moreover, respondent's professed concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Title VII, as amended by the PDA, mandates that decisions about the welfare of future children be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents or the courts.

(d) An employer's tort liability for potential fetal injuries and its increased costs due to fertile women in the workplace do not require a different result. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best. Moreover, the incremental cost of employing members of one sex cannot justify a discriminatory refusal to hire members of that gender. See, e.g., Los Angeles Dept. of Water and Power v Manhart, 435 US 702, 716-718, and n 32, 55 L Ed 2d 657, 98 S Ct 1370.

886 F2d 871, reversed and remanded.

Blackmun, J., delivered the opinion of the Court, in which Marshall, Stevens, O'Connor, and Souter, JJ.,

joined. White, J., filed an opinion concurring in part and concurring in the judgment, in which Rehnquist, C. J., and Kennedy, J., joined. Scalia, J., filed an opinion concurring in the judgment.

APPEARANCES OF COUNSEL

Marsha S. Berzon argued the cause for petitioners.
Stanley S. Jaspan argued the cause for respondent.
Briefs of Counsel, p 750, infra.

OPINION OF THE COURT

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Justice **Blackmun** delivered the opinion of the Court.

[1a] In this case we are concerned with an employer's gender-based fetal-protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?

I

Respondent Johnson Controls, Inc., manufactures batteries. In the manufacturing process, the element lead is a primary ingredient. Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee.

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Before the Civil Rights Act of 1964, 78 Stat 241, became law, Johnson Controls did not employ any woman in a battery-manufacturing job. In June 1977, however, it announced its first official policy concerning its employment of women in lead-exposure work:

> "[P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.
>
> ". . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant." App 140.

Consistent with that view, Johnson Controls "stopped short of excluding women capable of bearing children from lead exposure," id., at 138, but emphasized that a woman who expected to have a child should not choose a job in which she would have such exposure. The company also required a woman who wished to be considered for employment to sign a statement that she had been advised of the risk of having a child while she was exposed to lead. The statement informed the woman that although there was evidence "that women exposed to lead have a higher rate of abortion," this evidence was "not as clear . . . as the relationship between cigarette smoking and cancer," but that it was, "medically speaking, just good sense not to run that risk if you want children and do not want to expose the unborn child to risk, however small . . ." Id., at 142-143.

Five years later, in 1982, Johnson Controls shifted from a policy of warning to a policy of exclusion.

Between 1979 and 1983, eight employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter. Tr of Oral Arg 25, 34. This appeared to be the critical level

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noted by the Occupational Safety and Health Administration (OSHA) for a worker who was planning to have a family. See 29 CFR § 1910.1025 (1990). The company responded by announcing a broad exclusion of women from jobs that exposed them to lead:

> "[I]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." App 85-86.

The policy defined "women . . . capable of bearing children" as "[a]ll women except those whose inability to bear children is medically documented." Id., at 81. It further stated that an unacceptable work station was one where, "over the past year," an employee had recorded a blood lead level of more than 30 micrograms per deciliter or the work site had yielded an air sample containing a lead level in excess of 30 micrograms per cubic meter. Ibid.

II

In April 1984, petitioners filed in the United States District Court for the Eastern District of Wisconsin a class action challenging Johnson Controls' fetal-protection policy as sex discrimination that violated Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e et seq. [42 USCS §§ 2000e et seq.]. Among the individual plaintiffs were petitioners Mary Craig, who had chosen to be sterilized in order to avoid losing her job, Elsie Nason, a 50-year-old divorcee, who had suffered a loss in compensation when she was transferred out of a job where she was exposed to lead, and Donald Penney, who had been denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father. Upon stipulation of the parties, the District Court certified a class consisting of "all past, present and future production and maintenance employees" in United Auto Workers bargaining

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units at nine of Johnson Controls' plants "who have been and continue to be affected by [the employer's] Fetal Protection Policy implemented in 1982." No. 84-C-0472 (Feb. 25, 1985), pp 1, 2.

The District Court granted summary judgment for defendant-respondent Johnson Controls. 680 F Supp 309 (1988). Applying a three-part business necessity defense derived from fetal-protection cases in the Courts of Appeals for the Fourth and Eleventh Circuits, the District Court concluded that while "there is a disagreement among the experts regarding the effect of lead on the fetus," the hazard to the fetus through exposure to lead was established by "a considerable body of opinion"; that although "[e]xpert opinion has been provided which holds that lead also affects the reproductive abilities of men and women . . . [and] that these effects are as great as the effects of exposure of the fetus . . . a great body of experts are of the opinion that the fetus is more vulnerable to levels of lead that would not affect adults"; and that petitioners had "failed to estab-

lish that there is an acceptable alternative policy which would protect the fetus." Id., at 315-316. The court stated that, in view of this disposition of the business necessity defense, it did not "have to undertake a bona fide occupational qualification's [sic] (BFOQ) analysis." Id., at 316, n 5.

The Court of Appeals for the Seventh Circuit, sitting en banc, affirmed the summary judgment by a 7-to-4 vote. 886 F2d 871 (1989). The majority held that the proper standard for evaluating the fetal-protection policy was the defense of business necessity; that Johnson Controls was entitled to summary judgment under that defense; and that even if the proper standard was a BFOQ, Johnson Controls still was entitled to summary judgment.

The Court of Appeals, see id., at 883-885, first reviewed fetal-protection opinions from the Eleventh and Fourth Circuits. See Hayes v Shelby Memorial Hospital, 726 F2d 1543 (CA11 1984), and Wright v Olin Corp. 697 F2d 1172

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(CA4 1982). Those opinions established the three-step business necessity inquiry: whether there is a substantial health risk to the fetus; whether transmission of the hazard to the fetus occurs only through women; and whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus. 886 F2d, at 885. The Court of Appeals agreed with the Eleventh and Fourth Circuits that "the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." Id., at 886. The court further noted that, under Wards Cove Packing Co. v Atonio, 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115 (1989), the burden of persuasion remained on the plaintiff in challenging a business necessity defense, and—unlike the Fourth and Eleventh Circuits—it thus imposed the burden on the plaintiffs for all three steps. 886 F2d, at 887-893. Cf. Hayes, 726 F2d, at 1549, and Wright, 697 F2d, at 1187.

Applying this business necessity defense, the Court of Appeals ruled that Johnson Controls should prevail. Specifically, the court concluded that there was no genuine issue of material fact about the substantial health-risk factor because the parties agreed that there was a substantial risk to a fetus from lead exposure. 886 F2d, at 888-889. The Court of Appeals also concluded that, unlike the evidence of risk to the fetus from the mother's exposure, the evidence of risk from the father's exposure, which petitioners presented, "is, at best, speculative and unconvincing." Id., at 889. Finally, the court found that petitioners had waived the issue of less discriminatory alternatives by not adequately presenting it. It said that, in any event, petitioners had not produced evidence of less discriminatory alternatives in the District Court. Id., at 890-893.

Having concluded that the business necessity defense was the appropriate framework and that Johnson Controls satisfied

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that standard, the court proceeded to discuss the BFOQ defense and concluded that Johnson Controls met that test, too. Id., at 893-894. The en banc majority ruled that industrial safety is part of the essence of respondent's business,

and that the fetal-protection policy is reasonably necessary to further that concern. Quoting Dothard v Rawlinson, 433 US 321, 335, 53 L Ed 2d 786, 97 S Ct 2720 (1977), the majority emphasized that, in view of the goal of protecting the unborn, "more is at stake" than simply an individual woman's decision to weigh and accept the risks of employment. 886 F2d, at 898.

Judges Cudahy and Posner dissented and would have reversed the judgment and remanded the case for trial. Judge Cudahy explained: "It may (and should) be difficult to establish a BFOQ here but I would afford the defendant an opportunity to try." Id., at 901. "[T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety." Id., at 902, n 1. He concluded that this case's "painful complexities are manifestly unsuited for summary judgment." Id., at 902.

Judge Posner stated: "I think it a mistake to suppose that we can decide this case once and for all on so meager a record." Ibid. He, too, emphasized that, under Title VII, a fetal-protection policy which explicitly applied just to women could be defended only as a BFOQ. He observed that Title VII defines a BFOQ defense as a " 'bona fide occupational qualification reasonably necessary to the normal operation' " of a business, and that "the 'normal operation' of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties." Id., at 902 and 904. He emphasized, however, that whether a particular policy is lawful is a question of fact that should ordinarily be resolved at trial. Id., at 906. Like Judge Cudahy, he stressed that "it will be the rare case where the lawfulness of such a policy can be decided on the defendant's motion for summary judgment." Ibid.

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Judge Easterbrook, also in dissent and joined by Judge Flaum, agreed with Judges Cudahy and Posner that the only defense available to Johnson Controls was the BFOQ. He concluded, however, that the BFOQ defense would not prevail because respondent's stated concern for the health of the unborn was irrelevant to the operation of its business under the BFOQ. He also viewed the employer's concern as irrelevant to a woman's ability or inability to work under the Pregnancy Discrimination Act's amendment to Title VII, 92 Stat 2076, 42 USC § 2000e(k) [42 USCS § 2000e(k)]. Judge Easterbrook also stressed what he considered the excessive breadth of Johnson Controls' policy. It applied to all women (except those with medical proof of incapacity to bear children) although most women in an industrial labor force do not become pregnant, most of those who do become pregnant will have blood lead levels under 30 micrograms per deciliter, and most of those who become pregnant with levels exceeding that figure will bear normal children anyway. 886 F2d, at 912-913. "Concerns about a tiny minority of women cannot set the standard by which all are judged." Id., at 913.

With its ruling, the Seventh Circuit became the first Court of Appeals to hold that a fetal-protection policy directed exclusively at women could qualify as a BFOQ. We granted certiorari, 494 US 1055, 108 L Ed 2d 762, 110 S Ct 1522 (1990), to resolve the obvious conflict between the Fourth, Seventh, and Eleventh

Circuits on this issue, and to address the important and difficult question whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant.[1]

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III

The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. Section 703(a) of the Civil Rights Act of 1964, 78 Stat 255, as amended, 42 USC § 2000e-2(a) [42 USCS § 2000e-2(a)], prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status.[2] Respondent's fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender. Respondent assumes as much in its brief before this Court. Brief for Respondent 17, n 24.

[2, 3] Nevertheless, the Court of Appeals assumed, as did the two appellate courts that already had confronted the issue, that sex-specific fetal-protection policies do not involve facial discrimination. 886 F2d, at 886-887; Hayes, 726 F2d, at 1547; Wright, 697 F2d, at 1190. These courts analyzed the policies as though they were facially neutral and had only a

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discriminatory effect upon the employment opportunities of women. Consequently, the courts looked to see if each employer in question had established that its policy was justified as a business necessity. The business necessity standard is more lenient for the employer than the statutory BFOQ defense. The Court of Appeals here went one step further and invoked the burden-shifting framework set forth in Wards Cove Packing Co. v Atonio, 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115 (1989), thus requiring petitioners to bear the burden of persuasion on all questions. 886 F2d, at 887-888. The court assumed that because the asserted reason for the

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1. Since our grant of certiorari, the Sixth Circuit has reversed a District Court's summary judgment for an employer that had excluded fertile female employees from foundry jobs involving exposure to specified concentrations of air-borne lead. See Grant v General Motors Corp. 908 F2d 1303 (1990). The court said: "We agree with the view of the dissenters in Johnson Controls that fetal protection policies perforce amount to overt sex discrimination, which cannot logically be recast as disparate impact and cannot be countenanced without proof that infertility is a BFOQ. . . . [P]laintiff . . . has alleged a claim of overt discrimination that her employer may justify only through the BFOQ defense." Id., at 1310.

In Johnson Controls, Inc. v Fair Employment & Housing Comm'n, 218 Cal App 3d 517, 267 Cal Rptr 158 (1990), the court held respondent's fetal-protection policy invalid under California's fair-employment law.

2. The statute reads:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

sex-based exclusion (protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination. That assumption, however, was incorrect.

[1b] First, Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees. Accordingly, it appears that Johnson Controls would have lost in the Eleventh Circuit under Hayes because its policy does not "effectively and equally protec[t] the offspring of all employees." 726 F2d, at 1548. This Court faced a conceptually similar situation in Phillips v Martin Marietta Corp. 400 US 542, 27 L Ed 2d 613, 91 S Ct 496 (1971), and found sex discrimination because the policy established "one hiring policy for women and another for men—each having pre-school-age children." Id., at 544, 27 L Ed 2d 613, 91 S Ct 496. Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.

[1c, 4] Our conclusion is bolstered by the Pregnancy Discrimination Act (PDA), 42 USC § 2000e(k) [42 USCS § 2000e(k)], in which Congress explicitly provided that, for purposes of Title VII, discrimination "'on the basis of sex'" includes discrimination "because

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of or on the basis of pregnancy, childbirth, or related medical conditions."[3] "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Newport News Shipbuilding & Dry Dock Co. v EEOC, 462 US 669, 684, 77 L Ed 2d 89, 103 S Ct 2622 (1983). In its use of the words "capable of bearing children" in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.

[1d, 5] We concluded above that Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females. Moreover, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrim-

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3. The Act added subsection (k) to § 701 of the Civil Rights Act of 1964 and reads in pertinent part:

"The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."

ination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. In Martin Marietta, supra, the motives underlying the employers' express exclusion of women did not alter the intentionally discriminatory character of the policy. Nor did the arguably benign motives lead to consideration of a business necessity defense. The question

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in that case was whether the discrimination in question could be justified under § 703(e) as a BFOQ. The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.

[1e] The enforcement policy of the Equal Employment Opportunity Commission accords with this conclusion. On January 24, 1990, the EEOC issued a Policy Guidance in the light of the Seventh Circuit's decision in the present case. App to Pet for Cert 127a. The document noted: "For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." Id., at 133a. The Commission concluded: "[W]e now think BFOQ is the better approach." Id., at 134a.

In sum, Johnson Controls' policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " Los Angeles Dept. of Water and Power v Manhart, 435 US 702, 711, 55 L Ed 2d 657, 98 S Ct 1370 (1978), quoting Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv L Rev 1109, 1170 (1971). We hold that Johnson Controls' fetal-protection policy is sex discrimination forbidden under Title VII unless respondent can establish that sex is a "bona fide occupational qualification."

IV

Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 USC § 2000e-2(e)(1) [42 USCS § 2000e-2(e)(1)]. We therefore turn to the question whether Johnson Controls' fetal-protection policy

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is one of those "certain instances" that come within the BFOQ exception.

[6a] The BFOQ defense is written narrowly, and this Court has read it narrowly. See, e. g., Dothard v Rawlinson, 433 US 321, 332-337, 53 L Ed 2d 786, 97 S Ct 2720 (1977); Trans World Airlines, Inc. v Thurston, 469 US 111, 122-125, 83 L Ed 2d 523, 105 S Ct 613 (1985). We have read the BFOQ language of § 4(f) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat 603, as amended, 29 USC § 623(f)(1) [29 USCS § 623(f)(1)], which tracks the BFOQ provision in Title VII, just as narrowly. See Western Air Lines, Inc. v Criswell, 472 US 400, 86 L Ed 2d 321, 105 S Ct 2743 (1985). Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of § 703.

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception

reaches only special situations. The statute thus limits the situations in which discrimination is permissible to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

Justice White defines "occupational" as meaning related to a job. Post, at 212, n 1, 113 L Ed 2d, at 182. According to him, any discriminatory requirement imposed by an employer is "job-related" simply because the employer has chosen to make the requirement a condition of employment. In effect, he argues that sterility may be an occupational qualification for women because Johnson Controls has chosen to require it. This reading of "occupational" renders the work mere surplusage. "Qualification" by itself would encompass an employer's idiosyncratic requirements. By modifying "qualification" with "occupational," Congress narrowed the term to qualifications that affect an employee's ability to do the job.

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Johnson Controls argues that its fetal-protection policy falls within the so-called safety exception to the BFOQ. Our cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances. In Dothard v Rawlinson, this Court indicated that danger to a woman herself does not justify discrimination. 433 US, at 335, 53 L Ed 2d 786, 97 S Ct 2720. We there allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries only because more was at stake than the "individual woman's decision to weigh and accept the risks of employment." Ibid. We found sex to be a BFOQ inasmuch as the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman. Sex discrimination was tolerated because sex was related to the guard's ability to do the job—maintaining prison security. We also required in Dothard a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one.

Similarly, some courts have approved airlines' layoffs of pregnant flight attendants at different points during the first five months of pregnancy on the ground that the employer's policy was necessary to ensure the safety of passengers. See Harriss v Pan American World Airways, Inc. 649 F2d 670 (CA9 1980); Burwell v Eastern Air Lines, Inc. 633 F2d 361 (CA4 1980), cert denied, 450 US 965, 67 L Ed 2d 613, 101 S Ct 1480 (1981); Condit v United Air Lines, Inc. 558 F2d 1176 (CA4 1977), cert denied, 435 US 934, 55 L Ed 2d 531, 98 S Ct 1510 (1978); In re National Airlines, Inc. 434 F Supp 249 (SD Fla 1977). In two of these cases, the courts pointedly indicated that fetal, as opposed to passenger, safety was best left to the mother. Burwell, 633 F2d, at 371; National Airlines, 434 F Supp, at 259.

We considered safety to third par-

ties in Western Airlines, Inc. v Criswell, supra, in the context of the ADEA. We focused upon "the nature of the flight engineer's tasks," and the "actual capabilities of persons over age 60" in relation to

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those tasks. 472 US, at 406, 86 L Ed 2d 321, 105 S Ct 2743. Our safety concerns were not independent of the individual's ability to perform the assigned tasks, but rather involved the possibility that, because of age-connected debility, a flight engineer might not properly assist the pilot, and might thereby cause a safety emergency. Furthermore, although we considered the safety of third parties in Dothard and Criswell, those third parties were indispensable to the particular business at issue. In Dothard, the third parties were the inmates; in Criswell, the third parties were the passengers on the plane. We stressed that in order to qualify as a BFOQ, a job qualification must relate to the "'essence,'" Dothard, 433 US, at 333, 53 L Ed 2d 786, 97 S Ct 2720 (emphasis deleted), or to the "central mission of the employer's business," Criswell, 472 US, at 413, 86 L Ed 2d 321, 105 S Ct 2743.

Justice White ignores the "essence of the business" test and so concludes that "protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons (Dothard) or flying airplanes (Criswell)." Post, at 217, 113 L Ed 2d, at 185. By limiting its discussion to cost and safety concerns and rejecting the "essence of the business" test that our case law has established, he seeks to expand what is now the narrow BFOQ defense. Third-party safety considerations properly entered into the BFOQ analysis in Dothard and Criswell because they went to the core of the employee's job performance. Moreover, that performance involved the central purpose of the enterprise. Dothard, 433 US, at 335, 53 L Ed 2d 786, 97 S Ct 2720 ("The essence of a correctional counselor's job is to maintain prison security"); Criswell, 472 US, at 413, 86 L Ed 2d 321, 105 S Ct 2743 (the central mission of the airline's business was the safe transportation of its passengers). Justice White attempts to transform this case into one of customer safety. The unconceived fetuses of Johnson Controls' female employees, however, are neither customers nor third parties whose safety is essential to the business of battery manufacturing. No one can disregard the possibility of injury to future children; the BFOQ, however,

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is not so broad that it transforms this deep social concern into an essential aspect of battery making.

Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job. This approach is consistent with the language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job. Johnson Controls suggests, however, that we expand the exception to allow fetal-protection policies that mandate particular standards for pregnant or fertile women. We decline to do so. Such an expansion contradicts not only the language of the BFOQ and the narrowness of its exception, but also the plain language and history of the PDA.

The PDA's amendment to Title

VII contains a BFOQ standard of its own: Unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes." 42 USC § 2000e(k) [42 USCS § 2000e(k)]. This language clearly sets forth Congress' remedy for discrimination on the basis of pregnancy and potential pregnancy. Women who are either pregnant or potentially pregnant must be treated like others "similar in their ability . . . to work." Ibid. In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.

Justice White asserts that the PDA did not alter the BFOQ defense. Post, at 218, 113 L Ed 2d, at 185-186. He arrives at this conclusion by ignoring the second clause of the Act, which states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 USC § 2000e(k) [42 USCS § 2000e(k)]. Until this day, every Member of this Court had acknowledged that "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be

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treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work." California Federal Savings and Loan Assn. v Guerra, 479 US 272, 297, 93 L Ed 2d 613, 107 S Ct 683 (1987) (White, J., dissenting). Justice White now seeks to read the second clause out of the Act.

The legislative history confirms what the language of the PDA compels. Both the House and Senate Reports accompanying the legislation indicate that this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children. See Amending Title VII, Civil Rights Act of 1964, S Rep No. 95-331, pp 4-6 (1977):

> "Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees . . . .
>
> . . . . .
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> ". . . [U]nder this bill, employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue."

See also Prohibition of Sex Discrimination Based on Pregnancy, HR Rep No. 95-948, pp 3-6 (1978).

This history counsels against expanding the BFOQ to allow fetal-protection policies. The Senate Report quoted above states that employers may not require a pregnant woman to stop working at any time during her pregnancy unless she is unable to do her work. Employment late in pregnancy often imposes risks on the unborn child, see Chavkin, Walking a Tightrope: Pregnancy, Parenting, and Work, in Double Exposure 196, 196-202 (W. Chavkin ed 1984), but Congress indicated that the employer may take into account

only the woman's ability to get her job done. See Becker, From Muller v Oregon to Fetal Vulnerability Policies, 53 U Chi

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L Rev 1219, 1255-1256 (1986). With the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself.

[6b, 7a] We conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We reiterate our holdings in Criswell and Dothard that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business.[4]

V

[1f] We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the

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PDA. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization.

Nor can concerns about the welfare of the next generation be considered a part of the "essence" of Johnson Controls' business. Judge Easterbrook in this case pertinently observed: "It is word play to say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western Air Lines is to fly planes without crashing." 886 F2d, at 913.

Johnson Controls argues that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead. This argument is somewhat academic in light of our conclusion that the company may not exclude fertile women at all; it perhaps is worth noting, however, that Johnson Controls has shown no "factual basis for believing that all

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4. **[7b]** Justice White predicts that our reaffirmation of the narrowness of the BFOQ defense will preclude considerations of privacy as a basis for sex-based discrimination. Post, at 219-220, n 8, 113 L Ed 2d, at 187. We have never addressed privacy-based sex discrimination and shall not do so here because the sex-based discrimination at issue today does not involve the privacy interests of Johnson Controls' customers. Nothing in our discussion of the "essence of the business test," however, suggests that sex could not constitute a BFOQ when privacy interests are implicated. See, e.g., Backus v Baptist Medical Center, 510 F Supp 1191 (ED Ark 1981), vacated as moot, 671 F2d 1100 (CA8 1982) (essence of obstetrics nurse's business is to provide sensitive care for patient's intimate and private concerns).

or substantially all women would be unable to perform safely and efficiently the duties of the job involved." Weeks v Southern Bell Tel. & Tel. Co. 408 F2d 228, 235 (CA5 1969), quoted with approval in Dothard, 433 US, at 333, 53 L Ed 2d 786, 97 S Ct 2720. Even on this sparse record, it is apparent that Johnson Controls is concerned about only a small minority of women. Of the eight pregnancies reported among the female employees, it has not been shown that any of the babies have birth defects or other abnormalities. The record does not reveal the birth rate for Johnson Controls' female workers, but national statistics show that approximately nine percent of all fertile women become pregnant each year. The birthrate drops to two percent for blue collar workers over age 30. See Becker, 53 U Chi L Rev, at 1233. Johnson Controls' fear of prenatal injury, no matter how sincere, does not begin to show that substantially all of its fertile women employees are incapable of doing their jobs.

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VI

A word about tort liability and the increased cost of fertile women in the workplace is perhaps necessary. One of the dissenting judges in this case expressed concern about an employer's tort liability and concluded that liability for a potential injury to a fetus is a social cost that Title VII does not require a company to ignore. 886 F2d, at 904-905. It is correct to say that Title VII does not prevent the employer from having a conscience. The statute, however, does prevent sex-specific fetal-protection policies. These two aspects of Title VII do not conflict.

[8a] More than 40 States currently recognize a right to recover for a prenatal injury based either on negligence or on wrongful death. See, e.g., Wolfe v Isbell, 291 Ala 327, 333-334, 280 So 2d 758, 763 (1973); Simon v Mullin, 34 Conn Supp 139, 147, 380 A2d 1353, 1357 (1977). See also Note, 22 Suffolk U L Rev 747, 754-756, and nn 54, 57, and 58 (1988) (listing cases). According to Johnson Controls, however, the company complies with the lead standard developed by OSHA and warns its female employees about the damaging effects of lead. It is worth noting that OSHA gave the problem of lead lengthy consideration and concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." 43 Fed Reg 52952, 52966 (1978). See also id., at 54354, 54398. Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." Id., at 52966. See 29 CFR § 1910.1025(k)(ii) (1990). Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

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Although the issue is not before us, Justice White observes that "it is far from clear that compliance with Title VII will pre-empt state tort liability." Post, at 213, 113 L Ed 2d, at 182. The cases relied upon by him to support his prediction, however, are inapposite.

For example, in California Federal Savings and Loan Assn. v Guerra, 479 US 272, 93 L Ed 2d 613, 107 S Ct 683 (1987), we considered a California statute that expanded upon the requirements of the PDA and concluded that the statute was not pre-empted by Title VII because it was not inconsistent with the purposes of the federal statute and did not require an act that was unlawful under Title VII. Id., at 291-292, 93 L Ed 2d 613, 107 S Ct 683. Here, in contrast, the tort liability that Justice White fears will punish employers for *complying* with Title VII's clear command. When it is impossible for an employer to comply with both state and federal requirements, this Court has ruled that federal law pre-empts that of the States. See, e. g., Florida Lime & Avocado Growers, Inc. v Paul, 373 US 132, 142-143, 10 L Ed 2d 248, 83 S Ct 1210 (1963).

This Court faced a similar situation in Farmers Union v WDAY, Inc. 360 US 525, 3 L Ed 2d 1407, 79 S Ct 1302 (1959). In WDAY, it held that § 315(a) of the Federal Communications Act of 1934 barred a broadcasting station from removing defamatory statements contained in speeches broadcast by candidates for public office. It then considered a libel action which arose as a result of a speech made over the radio and television facilities of WDAY by a candidate for the 1956 senatorial race in North Dakota. It held that the statutory prohibition of censorship carried with it an immunity from liability for defamatory statements made by the speaker. To allow libel actions "would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." Id., at 531, 3 L Ed 2d 1407, 79 S Ct 1302. It concluded:

> "We are aware that causes of action for libel are widely recognized throughout the States. But we have not hesitated to abrogate state law where satisfied that
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> **[499 US 210]**
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> its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id., at 535, 3 L Ed 2d 1407, 79 S Ct 1302, quoting Bethlehem Steel Co. v New York State Labor Relations Bd., 330 US 767, 773, 91 L Ed 1234, 67 S Ct 1026 (1947).

[9] If state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII. Because Johnson Controls has not argued that it faces any costs from tort liability, not to mention crippling ones, the pre-emption question is not before us. We therefore say no more than that the concurrence's speculation appears unfounded as well as premature.

[8b] The tort-liability argument reduces to two equally unpersuasive propositions. First, Johnson Controls attempts to solve the problem of reproductive health hazards by resorting to an exclusionary policy. Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace. Second, the spectre of an award of damages reflects a fear that hiring fertile women will cost more. The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a

discriminatory refusal to hire members of that gender. See Manhart, 435 US, at 716-718, and n 32, 55 L Ed 2d 657, 98 S Ct 1370. Indeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the "decision to forbid special treatment of pregnancy despite the social costs associated therewith." Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v Norris, 463 US 1073, 1085, n 14, 77 L Ed 2d 1236, 103 S Ct 3492 (1983) (opinion of Marshall, J.). See Price Waterhouse v Hopkins, 490 US 228, 104 L Ed 2d 268, 109 S Ct 1775 (1989).

We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the

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survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.

VII

[1g] Our holding today that Title VII, as so amended, forbids sex-specific fetal-protection policies is neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. See, e.g., Muller v Oregon, 208 US 412, 52 L Ed 551, 28 S Ct 324 (1908). Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the PDA means what it says.

It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice **White,** with whom The **Chief Justice** and Justice **Kennedy** join, concurring in part and concurring in the judgment.

The Court properly holds that Johnson Controls' fetal-protection policy overtly discriminates against women, and thus is prohibited by Title VII of the Civil Rights Act of 1964 unless it falls within the bona fide occupational qualification (BFOQ) exception, set forth at 42 USC § 2000e-2(e) [42 USCS § 2000e-2(e)]. The Court erroneously holds, however, that the BFOQ defense is so narrow that it could never justify a sex-specific fetal-protection policy. I nevertheless concur in the judgment of reversal because on the record before us summary judgment in favor of Johnson Controls was improperly entered

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by the District Court and affirmed by the Court of Appeals.

I

In evaluating the scope of the BFOQ defense, the proper starting point is the language of the statute. Cf. Demarest v Manspeaker, 498 US 184, 190, 112 L Ed 2d 608, 111 S Ct

599 (1991); Board of Ed. of Westside Community Schools (Dist. 66) v Mergens, 496 US 226, 237, 110 L Ed 2d 191, 110 S Ct 2356 (1990). Title VII forbids discrimination on the basis of sex, except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 USC § 2000e-2(e)(1) [42 USCS § 2000e-2(e)(1)]. For the fetal-protection policy involved in this case to be a BFOQ, therefore, the policy must be "reasonably necessary" to the "normal operation" of making batteries, which is Johnson Controls' "particular business." Although that is a difficult standard to satisfy, nothing in the statute's language indicates that it could *never* support a sex-specific fetal-protection policy.[1]

On the contrary, a fetal-protection policy would be justified under the terms of the statute if, for example, an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability. Common sense tells us that it is part of the normal operation of business concerns to avoid causing injury to third parties, as well as to employees, if for no other reason than to avoid

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tort liability and its substantial costs. This possibility of tort liability is not hypothetical; every State currently allows children born alive to recover in tort for prenatal injuries caused by third parties, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 55, p 368 (5th ed 1984), and an increasing number of courts have recognized a right to recover even for prenatal injuries caused by torts committed prior to conception, see 3 F. Harper, F. James, & O. Gray, Law of Torts § 18.3, pp 677-678, n 15 (2d ed 1986).

The Court dismisses the possibility of tort liability by no more than speculating that if "Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." Ante, at 208, 113 L Ed 2d, at 179. Such speculation will be small comfort to employers. First, it is far from clear that compliance with Title VII will pre-empt state tort liability, and the Court offers no support for that proposition.[2] Second,

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1. The Court's heavy reliance on the word "'occupational'" in the BFOQ statute, ante, at 201, 113 L Ed 2d, at 175, is unpersuasive. *Any* requirement for employment can be said to be an occupational qualification, since "occupational" merely means related to a job. See Webster's Third New International Dictionary 1560 (1976). Thus, Johnson Controls' requirement that employees engaged in battery manufacturing be either male or nonfertile clearly is an "occupational qualification." The issue, of course, is whether that qualification is "reasonably necessary to the normal operation" of Johnson Controls' business. It is telling that the Court offers no case support, either from this Court or the lower federal courts, for its interpretation of the word "occupational."

2. Cf. English v General Electric Co. 496 US 72, 110 L Ed 2d 65, 110 S Ct 2270 (1990) (state law action for intentional infliction of emotional distress not pre-empted by Energy Reorganization Act of 1974); California Federal Savings and Loan Assn. v Guerra, 479 US 272, 290-292, 93 L Ed 2d 613, 107 S Ct 683 (1987) (state statute requiring the provision of leave and reinstatement to employees disabled by pregnancy not pre-empted by the Pregnancy Discrimination Act (PDA), 92 Stat 2076, 42 USC § 2000e(k) [42 USCS § 2000e(k)]); Silkwood v Kerr-McGee Corp. 464 US 238, 256, 78 L Ed 2d 443, 104 S Ct 615 (1984) (state punitive damage claim not pre-empted by federal laws regulating nuclear power plants); Bernstein v Aetna Life & Casualty, 843 F2d 359, 364-365 (CA9 1988) ("It is well-established that Title VII does not preempt state common law remedies"); see also 42 USC § 2000e-7 [42 USCS § 2000e-7].

although warnings may preclude claims by injured *employees,* they will not preclude claims by injured children because the general rule is that parents cannot waive causes of action on behalf of their children, and the parents' negligence will not be imputed to the children.[3] Finally, although state tort liability

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for prenatal injuries generally requires negligence, it will be difficult for employers to determine in advance what will constitute negligence. Compliance with OSHA standards, for example, has been held not to be a defense to state tort or criminal liability. See National Solid Wastes Management Assn. v Killian, 918 F2d 671, 680, n 9 (CA7 1990) (collecting cases); see also 29 USC § 653(b)(4) [29 USCS § 653(b)(4)]. Moreover, it is possible that employers will be held strictly liable, if, for example, their manufacturing process is considered "abnormally dangerous." See Restatement (Second) of Torts § 869, Comment *b* (1979).

Relying on Los Angeles Dept. of Water and Power v Manhart, 435 US 702, 55 L Ed 2d 657, 98 S Ct 1370 (1978), the Court contends that tort liability cannot justify a fetal-protection policy because the extra costs of hiring women is not a defense under Title VII. Ante, at 210, 113 L Ed 2d, at 180-181. This contention misrepresents our decision in Manhart. There, we held that a requirement that female employees contribute more than male employees to a pension fund, in order to reflect the greater longevity of women, constituted discrimination against women under Title VII because it treated them as a class rather than as individuals. 435 US, at 708, 716-717, 55 L Ed 2d 657, 98 S Ct 1370. We did not in that case address in any detail the nature of the BFOQ defense, and we certainly did not hold that cost was irrelevant to the BFOQ analysis. Rather, we merely stated in a footnote that "there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan." Id., at 716, n 30, 55 L Ed 2d 657, 98 S Ct 1370. We further noted that although Title VII does not contain a "cost-justification defense comparable to the affirmative defense available in a price discrimination

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suit," "no defense based on the *total* cost of employing men and women was attempted in this case." Id., at 716-717, and n 32, 55 L Ed 2d 657, 98 S Ct 1370.

Prior decisions construing the BFOQ defense confirm that the defense is broad enough to include considerations of cost and safety of the sort that could form the basis for an employer's adoption of a fetal-protection policy. In Dothard v Rawlinson, 433 US 321, 53 L Ed 2d 786, 97 S Ct 2720 (1977), the Court held that being male was a BFOQ for "contact" guard positions in Alabama's maximum-security male penitentiaries. The Court first took note of the actual conditions of the prison environment: "In a prison system

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3. See, e.g., In re Estate of Infant Fontaine, 128 NH 695, 700, 519 A2d 227, 230 (1986); Collins v Eli Lilly Co. 116 Wis 2d 166, 200, n 14, 342 NW2d 37, 53, n 14 (1984), cert denied, 469 US 826, 83 L Ed 2d 51, 105 S Ct 107 (1984); Doyle v Bowdoin College, 403 A2d 1206, 1208, n 3 (Me 1979); Littleton v Jordan, 428 SW2d 472 (Tex Civ App 1968); Fallaw v Hobbs, 113 Ga App 181, 182-183, 147 SE2d 517, 519 (1966); see also Restatement (Second) of Torts § 488(1) (1965).

where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians." Id., at 335-336, 53 L Ed 2d 786, 97 S Ct 2720. The Court also stressed that "[m]ore [was] at stake" than a risk to individual female employees: "The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." Ibid. Under those circumstances, the Court observed that "it would be an oversimplification to characterize [the exclusion of women] as an exercise in 'romantic paternalism.' Cf. Frontiero v Richardson, 411 US 677, 684 [36 L Ed 2d 583, 93 S Ct 1764]." Id., at 335, 53 L Ed 2d 786, 97 S Ct 2720.

We revisited the BFOQ defense in Western Air Lines, Inc. v Criswell, 472 US 400, 86 L Ed 2d 321, 105 S Ct 2743 (1985), this time in the context of the Age Discrimination in Employment Act of 1967 (ADEA). There, we endorsed the two-part inquiry for evaluating a BFOQ defense used by the Fifth Circuit Court of Appeals in Usery v Tamiami Trail Tours, Inc. 531 F2d 224 (1976). First, the job qualification must not be "so peripheral to the central mission of the employer's business" that no discrimination

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could be " 'reasonably *necessary* to the normal operation of the particular business.' " 472 US, at 413, 86 L Ed 2d 321, 105 S Ct 2743. Although safety is *not* such a peripheral concern, id., at 413, 419, 86 L Ed 2d 321, 105 S Ct 2743,[4] the inquiry " 'adjusts to the safety factor' "— " '[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications,' " id., at 413, 86 L Ed 2d 321, 105 S Ct 2743 (quoting Tamiami, supra, at 236). Second, the employer must show either that all or substantially all persons excluded " ' "would be unable to perform safely and efficiently the duties of the job involved," ' " or that it is " ' "impossible or highly impractical" ' " to deal with them on an individual basis. 472 US, at 414, 86 L Ed 2d 321, 105 S Ct 2743 (quoting Tamiami, supra, at 235 (quoting Weeks v Southern Bell Telephone & Telegraph Co. 408 F2d 228, 235 (CA5 1969))). We further observed that this inquiry properly takes into account an employer's interest in safety—"[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns

4. An example of a "peripheral" job qualification was in Diaz v Pan American World Airways, Inc. 442 F2d 385 (CA5), cert denied, 404 US 950, 30 L Ed 2d 267, 92 S Ct 275 (1971). There, the Fifth Circuit held that being female was not a BFOQ for the job of flight attendant, despite a determination by the trial court that women were better able than men to perform the "nonmechanical" functions of the job, such as attending to the passengers' psychological needs. The court concluded that such non-mechanical functions were merely "tangential" to the normal operation of the airline's business, noting that "[n]o one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another." 442 F2d, at 388.

for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business." 472 US, at 419, 86 L Ed 2d 321, 105 S Ct 2743.

Dothard and Criswell make clear that avoidance of substantial safety risks to third parties is *inherently* part of both an employee's ability to perform a job and an employer's

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"normal operation" of its business. Indeed, in both cases, the Court approved the statement in Weeks v Southern Bell Telephone & Telegraph Co., supra, that an employer could establish a BFOQ defense by showing that "all or substantially all women would be unable to perform *safely and efficiently* the duties of the job involved." Id., at 235 (emphasis added). See Criswell, 472 US, at 414, 86 L Ed 2d 321, 105 S Ct 2743; Dothard, supra, at 333, 53 L Ed 2d 786, 97 S Ct 2720. The Court's statement in this case that "the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job," ante, at 204, 113 L Ed 2d, at 176, therefore adds no support to its conclusion that a fetal-protection policy could never be justified as a BFOQ. On the facts of this case, for example, protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons (Dothard) or flying airplanes (Criswell).[5]

Dothard and Criswell also confirm that costs are relevant in determining whether a discriminatory policy is reasonably necessary for the normal operation of a business. In Dothard, the safety problem that justified exclusion of women from the prison guard positions was largely a result of inadequate staff and facilities. See 433 US, at 335, 53 L Ed 2d 786, 97 S Ct 2720. If the cost of employing women could not be considered, the employer there should have been required to hire more staff and restructure the prison environment rather than exclude women. Similarly, in Criswell the airline could have been

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required to hire more pilots and install expensive monitoring devices rather than discriminate against older employees. The BFOQ statute, however, reflects "Congress' unwillingness to require employers to change the very nature of their operations." Price Waterhouse v Hopkins, 490 US 228, 242, 104 L Ed 2d 268, 109 S Ct 1775 (1989) (plurality opinion).

The PDA, contrary to the Court's assertion, ante, at 204, 113 L Ed 2d, at 177, did not restrict the scope of the BFOQ defense. The PDA was only an amendment to the "Definitions" section of Title VII, 42 USC § 2000e [42 USCS § 2000e], and did

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5. I do not, as the Court asserts, ante, at 203, 113 L Ed 2d, at 176, reject the " 'essence of the business' " test. Rather, I merely reaffirm the obvious—that safety to third parties is part of the "essence" of most if not all businesses. Of course, the BFOQ inquiry " 'adjusts to the safety factor.' " Criswell, 472 US, at 413, 86 L Ed 2d 321, 105 S Ct 2743 (quoting Usery v Tamiami Trail Tours, Inc., 531 F2d 224, 236 (CA5 1976)). As a result, more stringent occupational qualifications may be justified for jobs involving higher safety risks, such as flying airplanes. But a recognition that the importance of safety varies amoung businesses does not mean that safety is completely irrelevant to the essence of a job such as battery manufacturing.

not purport to eliminate or alter the BFOQ defense. Rather, it merely clarified Title VII to make it clear that pregnancy and related conditions are included within Title VII's antidiscrimination provisions. As we have already recognized, "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v Norris, 463 US 1073, 1085, n 14, 77 L Ed 2d 1236, 103 S Ct 3492 (1983).[6]

This interpretation is confirmed by the PDA's legislative history. As discussed in Newport News Shipbuilding & Dry Dock Co. v EEOC, 462 US 669, 678-679, and n 17, 77 L Ed 2d 89, 103 S Ct 2622 (1983), the PDA was designed to overrule the decision in General Electric Co. v Gilbert, 429 US 125, 50 L Ed 2d 343, 97 S Ct 401 (1976), where the Court

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had held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." Id., at 136, 50 L Ed 2d 343, 97 S Ct 401. The PDA thus "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." Newport News, supra, at 684, 77 L Ed 2d 89, 103 S Ct 2622. It does not, however, alter the standards for employer *defenses*. The Senate Report, for example, stated that the PDA "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences [pregnancy, childbirth, and related medical conditions] peculiar to women; *it does not change the application of Title VII to sex discrimination in any other way.*" S Rep No. 95-331, pp 3-4 (1977) (emphasis added). Similarly, the House Report stated that "[p]regnancy-based distinctions will be subject to the same scrutiny *on the same terms* as other acts of sex discrimination proscribed in the existing statute." HR Rep No. 95-948, p 4 (1978) (emphasis added).[7]

In enacting the BFOQ standard, "Congress did not ignore the public interest in safety." Criswell, 472 US, at 419, 86 L Ed 2d 321, 105 S Ct 2743. The Court's narrow interpretation of the BFOQ defense in this case, however, means that an employer cannot exclude even *pregnant*

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6. Contrary to the Court's assertion, ante, at 204-205, 113 L Ed 2d, at 177, neither the majority decision nor the dissent in California Federal Savings and Loan Assn. v Guerra, 479 US 272, 93 L Ed 2d 613, 107 S Ct 683 (1987), is relevant to the issue whether the PDA altered the BFOQ standard for pregnancy-related discrimination. In that case, the Court held that the PDA did not pre-empt a state law requiring employers to provide leave and reinstatement to pregnant employees. The Court reasoned that the PDA was not intended to prohibit all employment practices that favor pregnant women. Id., at 284-290, 93 L Ed 2d 613, 107 S Ct 683. The dissent disagreed with that conclusion, arguing that the state statute was pre-empted because the PDA's language that pregnant employees "shall be treated the same for all employment-related purposes" appeared to forbid preferential treatment of pregnant workers. Id., at 297-298, 93 L Ed 2d 613, 107 S Ct 683. Obviously, the dispute in that case between the majority and the dissent was purely over what constituted *discrimination* under Title VII, as amended by the PDA, not over the scope of the BFOQ defense.

7. Even if the PDA *did* establish a separate BFOQ standard for pregnancy-related discrimination, if a female employee could only perform the duties of her job by imposing substantial safety and liability risks, she would not be "similar in [her] ability or inability to work" as a male employee, under the terms of the PDA. See 42 USC § 2000e(k) [42 USCS § 2000e(k)].

women from an environment highly toxic to their fetuses. It is foolish to think that Congress intended such a result, and neither the language of the BFOQ exception nor our cases requires it.[8]

[499 US 220]

II

Despite my disagreement with the Court concerning the scope of the BFOQ defense, I concur in reversing the Court of Appeals because that court erred in affirming the District Court's grant of summary judgment in favor of Johnson Controls. First, the Court of Appeals erred in failing to consider the level of risk avoidance that was part of Johnson Controls' "normal operation." Although the court did conclude that there was a "substantial risk" to fetuses from lead exposure in fertile women, 886 F2d 871, 879-883, 898 (CA7 1989), it merely meant that there was a high risk that *some* fetal injury would occur absent a fetal-protection policy. That analysis, of course, fails to address the *extent* of fetal injury that is likely to occur.[9] If the fetal-protection policy insists on a risk-avoidance level substantially higher than other risk levels

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tolerated by Johnson Controls such as risks to employees and consumers, the policy should not constitute a BFOQ.[10]

Second, even without more information about the normal level of risk at Johnson Controls, the fetal-protection policy at issue here reaches too far. This is evident both in its presumption that, absent medical documentation to the contrary, all women are fertile regardless of their age, see id., at 876, n 8, and in its exclusion of presumptively fertile women from positions that might result in a promotion to a position

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8. The Court's cramped reading of the BFOQ defense is also belied by the legislative history of Title VII, in which three examples of permissible sex discrimination were mentioned—a female nurse hired to care for an elderly woman, and all-male professional baseball team, and a masseur. See 110 Cong Rec 2718 (1964) (Rep. Goodell); id., at 7212-7213 (interpretive memorandum introduced by Sens. Clark and Case); id., at 2720 (Rep. Multer). In none of those situations would gender "actually interfer[e] with the employee's ability to perform the job," as required today by the Court, ante, at 204, 113 L Ed 2d, at 176.

The Court's interpretation of the BFOQ standard also would seem to preclude considerations of privacy as a basis for sex-based discrimination, since those considerations do not relate directly to an employee's physical ability to perform the duties of the job. The lower federal courts, however, have consistently recognized that privacy interests may justify sex-based requirements for certain jobs. See, e.g., Fesel v Masonic Home of Delaware, Inc. 447 F Supp 1346 (Del 1978), aff'd, 591 F2d 1334 (CA3 1979) (nurse's aide in retirement home); Jones v Hinds General Hospital, 666 F Supp 933 (SD Miss 1987) (nursing assistant); Local 567 American Federation of State, County, and Municipal Employees, AFL-CIO v Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL-CIO, 635 F Supp 1010 (ED Mich 1986) (mental health workers); Norwood v Dale Maintenance System, Inc. 590 F Supp 1410 (ND Ill 1984) (washroom attendant); Backus v Baptist Medical Center, 510 F Supp 1191 (ED Ark 1981), vacated as moot, 671 F2d 1100 (CA8 1982) (nursing position in obstetrics and gynecology department of hospital).

9. Apparently, between 1979 and 1983, only eight employees at Johnson Controls became pregnant while maintaining high blood lead levels, and only one of the babies born to this group later recorded an elevated blood lead level. See ante, at 191, 113 L Ed 2d, at 168-169; 886 F2d, at 876-877.

10. It is possible, for example, that alternatives to exclusion of women, such as warnings combined with frequent bloodtestings, would sufficiently minimize the risk such that it would be comparable to other risks tolerated by Johnson Controls.

involving high lead exposure, id., at 877. There has been no showing that either of those aspects of the policy is reasonably necessary to ensure safe and efficient operation of Johnson Controls' battery-manufacturing business. Of course, these infirmities in the company's policy do not warrant invalidating the entire fetal-protection program.

Third, it should be recalled that until 1982 Johnson Controls operated without an exclusionary policy, and it has not identified any grounds for believing that its current policy is reasonably necessary to its normal operations. Although it is now more aware of some of the dangers of lead exposure, id., at 899, it has not shown that the risks of fetal harm or the costs associated with it have substantially increased. Cf. Manhart, 435 US, at 716, n 30, 55 L Ed 2d 657, 98 S Ct 1370, in which we rejected a BFOQ defense because the employer had operated prior to the discrimination with no significant adverse effects.

Finally, the Court of Appeals failed to consider properly petitioners' evidence of harm to offspring caused by lead exposure in males. The court considered that evidence only in its discussion of the business necessity standard, in which it focused on whether *petitioners* had met their burden of proof. 886 F2d, at 889-890. The burden of proving that a discriminatory qualification is a BFOQ, however, rests with

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the employer. See, e.g., Price Waterhouse, 490 US, at 248, 104 L Ed 2d 268, 109 S Ct 1775; Dothard, 433 US, at 333, 53 L Ed 2d 786, 97 S Ct 2720. Thus, the court should have analyzed whether the evidence was sufficient for petitioners to survive summary judgment in light of *respondent's* burden of proof to establish a BFOQ. Moreover, the court should not have discounted the evidence as "speculative," 886 F2d, at 889, merely because it was based on animal studies. We have approved the use of animal studies to assess risks, see Industrial Union Dept. v American Petroleum Institute, 448 US 607, 657, n 64, 65 L Ed 2d 1010, 100 S Ct 2844 (1980), and OSHA uses animal studies in establishing its lead control regulations, see United Steelworkers of America, AFL-CIO-CLC v Marshall, 208 US App DC 60, 128, n 97, 647 F2d 1189, 1257, n 97 (1980), cert denied, 453 US 913, 69 L Ed 2d 997, 101 S Ct 3148, 101 S Ct 3149 (1981). It seems clear that if the Court of Appeals had properly analyzed that evidence, it would have concluded that summary judgment against petitioners was not appropriate because there was a dispute over a material issue of fact.

As Judge Posner observed below:

"The issue of the legality of fetal protection is as novel and difficult as it is contentious and the most sensible way to approach it at this early stage is on a case-by-case basis, involving careful examination of the facts as developed by the full adversary process of a trial. The record in this case is too sparse. The district judge jumped the gun. By affirming on this scanty basis we may be encouraging incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women for minor gains in fetal safety and health.

"But although the defendant did not present enough evidence to warrant the grant of summary judgment in its favor, there is no ground for barring it from pre-

senting additional evidence at trial. Therefore it would be equally precipitate for us to direct the entry of judgment in the plaintiffs' favor . . . ." 886 F2d, at 908.

[499 US 223]

Justice **Scalia,** concurring in the judgment.

I generally agree with the Court's analysis, but have some reservations, several of which bear mention.

First, I think it irrelevant that there was "evidence in the record about the debilitating effect of lead exposure on the male reproductive system," ante, at 198, 113 L Ed 2d, at 173. Even without such evidence, treating women differently "on the basis of pregnancy" constitutes discrimination "on the basis of sex," because Congress has unequivocally said so. Pregnancy Discrimination Act, 92 Stat 2076, 42 USC § 2000e(k) [42 USCS § 2000e(k)].

Second, the Court points out that "Johnson Controls has shown no factual basis for believing that all or substantially all women would be unable to perform safely . . . the duties of the job involved," ante, at 207, 113 L Ed 2d, at 178-179, this is not only "somewhat academic in light of our conclusion that the company may not exclude fertile women at all," ibid.; it is entirely irrelevant. By reason of the Pregnancy Discrimination Act, it would not matter if all pregnant women placed their children at risk in taking these jobs, just as it does not matter if no men do so. As Judge Easterbrook put it in his dissent below: "Title VII gives parents the power to make occupational decisions affecting their families. A legislative forum is available to those who believe that such decisions should be made elsewhere." 886 F2d 871, 915 (CA7 1989).

Third, I am willing to assume, as the Court intimates, ante, at 208-211, 113 L Ed 2d, at 179-181, that any action required by Title VII cannot give rise to liability under state tort law. That assumption, however, does not answer the question whether an action *is* required by Title VII (including the BFOQ provision) even if it is subject to liability under state tort law. It is perfectly reasonable to believe that Title VII has *accommodated* state tort law through the BFOQ exception. However, all that need be said in the present case is that Johnson has not demonstrated a substantial risk of tort liability—which is

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alone enough to defeat a tort-based assertion of the BFOQ exception.

Last, the Court goes far afield, it seems to me, in suggesting that increased cost alone—short of "costs . . . so prohibitive as to threaten the survival of the employer's business," ante, at 210, 113 L Ed 2d, at 181—cannot support a BFOQ defense. See ante, at 206, 113 L Ed 2d, at 178. I agree with Justice White's concurrence, ante, at 214, 113 L Ed 2d, at 183, that nothing in our prior cases suggests this, and in my view it is wrong. I think, for example, that a shipping company may refuse to hire pregnant women as crew members on long voyages because the onboard facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive. In the present case, however, Johnson has not asserted a cost-based BFOQ.

I concur in the judgment of the Court.

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SALVE REGINA COLLEGE, Petitioner

v

SHARON L. RUSSELL

499 US 225, 113 L Ed 2d 190, 111 S Ct 1217

[No. 89-1629]

Argued November 27, 1990. Decided March 20, 1991.

Decision: Federal Courts of Appeals held required to review de novo Federal District Courts' determinations of state law.

SUMMARY

An allegedly obese student was accepted into the nursing program at a Rhode Island college, but questions were subsequently raised as to the effect of her weight on her ability to complete the clinical requirements safely and satisfactorily, and the student was impelled to sign a "contract" conditioning her further participation in the program upon her attendance at weight-loss seminars and a specified average weekly weight loss. When the student failed to meet these commitments, she was asked to leave the program, and she transferred to another institution where she completed her nursing education, taking a year longer than would otherwise have been required. After leaving the program, the student filed a diversity-jurisdiction lawsuit against the college in the United States District Court for the District of Rhode Island, which suit, governed by the substantive law of Rhode Island, asserted, among other claims, that the college had failed to fulfill its implied agreement to educate the student. The District Court denied the college's motion for a directed verdict on the breach of contract claim, as the District Court Judge, relying in part on his more than 18 years of experience as a Rhode Island state trial judge, concluded as a matter of law that (1) the Supreme Court of Rhode Island would apply the doctrine of substantial performance, previously applied in Rhode Island to only construction contracts, to the facts of the case at hand, and (2) there was a legitimate factual issue as to whether there had been substantial performance by the student in her overall contractual relationship with the college. The breach of contract claim was submitted to the jury with a substantial-performance instruction, and a verdict was returned in favor of the student on that claim. In affirming the District Court's judgment, the United States Court of

Briefs of Counsel, p 752, infra.

Appeals for the First Circuit, referring to the "customary appellate deference" accorded to interpretations of state law made by federal judges of that state, held that the District Court's determination that the Supreme Court of Rhode Island would apply standard contract principles to the case was not reversible error (890 F2d 484).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by BLACKMUN, J., joined by MARSHALL, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., it was held that a Federal Court of Appeals should review de novo a Federal District Court's determination of state law, and that the Court of Appeals below had therefore erred in deferring to the local expertise of the District Court Judge, because (1) independent judicial review of legal issues by multijudge appellate panels best serves the goals of doctrinal coherence and judicial economy; (2) any expertise possessed by a District Court will be evident to a reviewing court; (3) nothing about the exercise of diversity jurisdiction warrants departure from a rule of independent appellate review; (4) appellate deference to individual District Court Judges' determination of state law would be inconsistent with established doctrine which seeks to discourage forum shopping and avoid inequitable administration of the laws; (5) the fact that the Courts of Appeals which had announced a rule of deference sometimes still overturned erroneous determinations of state law does not indicate that such courts actually undertook a plenary review of the issue; (6) although the mandate of independent review will alter the appellate outcome in only a few cases, those few cases show that the difference between a rule of deference and the duty of independent review is much more than a mere matter of degree; and (7) the proposition that District Court Judges are better able to intuit the answer to unsettled questions of state law (a) is founded on overbroad generalizations, and (b) is foreclosed by the established rule that the bases of state law are presumed to be communicable to a federal judge no less than to a state judge.

REHNQUIST, Ch. J., joined by WHITE and STEVENS, JJ., dissented, expressing the view that it was proper for the Court of Appeals in the case to accord weight to the conclusion of a particular district judge on the basis of the judge's experience and special knowledge of state law.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal §§ 1258.5, 1692.3 — following lower federal courts' view of state law — remand for error of law

1a-1e. A Federal Court of Appeals should review de novo a Federal District Court's determination as to state law—and the United States Supreme Court will therefore reverse and remand a Federal Court of Appeals' judgment affirming a Federal District Court's determination in a diversity case that the forum state's highest court would have applied substantial performance principles to the case at hand involving the alleged breach of a college's implied agreement to educate a nursing student who was asked to withdraw from the program because of her excessive weight, on the ground that the Court of Appeals erred in deferring to the local expertise of the District Court Judge, a former state trial judge—because (1) independent judicial review of legal issues best serves the goals of doctrinal coherence and judicial economy, given that (a) district judges preside alone over fast-paced trials and must often resolve complex legal issues without the benefit of extended reflection or extensive information, whereas (b) Court of Appeals Judges can devote their primary attention to legal issues, on which the parties can provide more information and analysis, and multijudge panels permit reflective dialogue and collective judgment; (2) any expertise possessed by the District Court will inform its conclusions of law and become evident to the reviewing court, and if the Court of Appeals finds that the District Court's research and analysis have exhausted the state-law inquiry, little more need be said in the appellate opinion, but independent review does not admit of unreflective reliance on a lower court's inarticul-

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32 Am Jur 2d, Federal Practice and Procedure § 367

2 Federal Procedure, L Ed, Appeal, Certiorari, and Review § 3:653

3 Am Jur Trials 553, Selecting the Forum—Plaintiff's Position

L Ed Digest, Appeal § 1258.5

L Ed Index, Appeal and Error; Erie Doctrine

Index to Annotations, Appeal and Error; Court of Appeals; Erie Doctrine

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

able intuitions; (3) nothing about the exercise of diversity jurisdiction warrants departure from a rule of independent appellate review; (4) appellate deference to individual District Court Judges' determination of state law would be inconsistent with the doctrine of Erie R. Co. v Tompkins (1938) 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487, which sought to discourage forum shopping and to avoid inequitable administration of the laws; (5) the fact that the Courts of Appeals which have announced a rule of deference have sometimes still overturned erroneous determinations of state law does not indicate that such courts have actually undertaken a plenary review of the issue; (6) although the mandate of independent review will alter the appellate outcome in only those few cases where the appellate court would resolve an unsettled issue of state law differently from the District Court's resolution, but cannot conclude that the District Court's determination constitutes clear error, these few instances show that the difference between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree; and (7) the proposition that District Court Judges, having regularly tried diversity cases from the states in which they sit and having generally had extensive experience as practitioner or judge from those states, are better able to intuit the answer to unsettled questions of state law, (a) is founded fatally on overbroad generalizations, and (b) more important, is foreclosed by the holding in Erie R. Co. v Tompkins that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge. (Rehnquist, Ch. J., and White and Stevens, JJ., dissented from this holding.)

Courts § 787 — federal courts applying state law

2. A federal court, sitting in a case in which federal jurisdiction is based on diversity of citizenship, must apply the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary.

Appeal § 1256 — authority to review

3. The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.

SYLLABUS BY REPORTER OF DECISIONS

Respondent Russell filed a diversity action in the District Court, alleging, inter alia, that petitioner college, located in Rhode Island, had breached an implied agreement to educate her when it asked her to withdraw from its nursing program for failing to meet certain weight loss commitments. The court denied petitioner's motion for a directed verdict, concluding that the Rhode Island Supreme Court would apply the commercial doctrine of substantial performance in an academic setting, such that Russell could prevail even though she had not fully complied with the contract's terms. The jury returned a verdict for Russell, which the Court of Appeals affirmed. Applying the appellate deference that it customarily accords to interpretations of state law made by federal judges of that State, the Court of Appeals found that the District

Court's state-law determination did not constitute reversible error.

Held: Courts of appeals must review de novo district courts' state-law determinations.

(a) The general rule of independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. Courts of appeals are structurally suited to the collaborative juridical process that promotes decisional accuracy. They are able to devote their primary attention to legal issues. They have the advantage of refined briefs which bring to bear on the legal issues more information and more comprehensive analysis than was provided to the district judge. And they employ multijudge panels that permit reflective dialogue and collective judgment.

(b) Departure from the rule of independent appellate review is not warranted by the exercise of diversity jurisdiction. Appellate deference to the district court's state-law determination is inconsistent with the aims of Erie R. Co. v Tompkins, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487 to discourage forum shopping and to avoid inequitable administration of the laws, since it invites divergent development of state law among the federal trial courts within a single State and creates a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. Such deference is also contrary to this Court's cases decided after Erie. See, e.g., New York Life Ins. Co. v Jackson, 304 US 261, 82 L Ed 1329, 58 S Ct 871.

(c) Russell's argument that appellate courts professing adherence to the deference rule actually are reviewing de novo the district court state-law determinations is rejected. Courts of appeals that profess deference are, in fact, deferring. When de novo review is compelled, no form of appellate deference is acceptable. Russell's argument that district judges are better arbiters of unsettled state law because they have exposure to the judicial system of the State in which they sit is based on overbroad generalizations and is foreclosed by this Court's decision in Erie.

890 F2d 484, reversed and remanded.

Blackmun, J., delivered the opinion of the Court, in which Marshall, O'Connor, Scalia, Kennedy, and Souter, JJ., joined. Rehnquist, C.J., filed a dissenting opinion, in which White and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Steven E. Snow argued the cause for petitioner.

Edward T. Hogan argued the cause for respondent.

Briefs of Counsel, p 752, infra.

OPINION OF THE COURT

[499 US 226]

Justice **Blackmun** delivered the opinion of the Court.

[1a, 2] The concept of a federal general common law, lurking (to use Justice Holmes' phrase) as a "brooding omnipresence in the sky," was questioned for some time before being firmly rejected in Erie R. Co. v Tompkins, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487 (1938). See Southern Pacific Co. v Jensen,

244 US 205, 222, 61 L Ed 1086, 37 S Ct 524 (1917) (Holmes, J., dissenting); Black & White Taxicab & Transfer Co. v Brown & Yellow Taxicab & Transfer Co. 276 US 518, 533, 72 L Ed 681, 48 S Ct 404, 57 ALR 426 (1928) (dissenting opinion). Erie mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary. 304 US, at 78, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487 See also 28 USC § 1652 [28 USCS § 1652] ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the

[499 US 227]

United States, in cases where they apply"). In decisions after Erie, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." Meredith v Winter Haven, 320 US 228, 238, 88 L Ed 9, 64 S Ct 7 (1943). See also Ruhlin v New York Life Ins. Co. 304 US 202, 208-209, 82 L Ed 1290, 58 S Ct 860 (1938) ("Application of the 'State law' to the present case . . . does not present the disputants with duties difficult or strange").

In this case, we must decide specifically whether a federal court of appeals may review a district court's determination of state law under a standard less probing than that applied to a determination of federal law.

I

The issue presented arises out of a contract dispute between a college and one of its students. Petitioner Salve Regina College is an institution of higher education located in Newport, R.I. Respondent Sharon L. Russell was admitted to the college and began her studies as a freshman in 1982. The following year, respondent sought admission to the college's nursing department in order to pursue a bachelor of science degree in nursing. She was accepted by the department and began her nursing studies in the fall of 1983.

Respondent, who was 5'6" tall, weighed in excess of 300 pounds when she was accepted in the nursing program. Immediately after the 1983 school year began, respondent's weight became a topic of commentary and concern by officials of the nursing program. Respondent's first year in the program was marked by a series of confrontations and negotiations concerning her obesity and its effect upon her ability to complete the clinical requirements safely and satisfactorily. During her junior year, respondent signed a document that was designated as a "contract" and conditioned her further

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participation in the nursing program upon weekly attendance at a weight-loss seminar and a realized average loss of two pounds per week. When respondent failed to meet these commitments, she was asked to withdraw from the program and did so. She transferred to a nursing program at another college, but had to repeat her junior year in order to satisfy the transferee institution's 2-year residency requirement. As a consequence, respondent's nursing education took five years rather than four. She also underwent surgery for her obesity. In 1987, respon-

dent successfully completed her nursing education, and she is now a registered nurse.

Soon after leaving Salve Regina College, respondent filed this civil action in the United States District Court for the District of Rhode Island. She asserted, among others, claims based on (1) intentional infliction of emotional distress, (2) invasion of privacy, and (3) nonperformance by the college of its implied agreement to educate respondent.[1] Subject-matter jurisdiction in the District Court was based on diversity of citizenship. See 28 USC § 1332 [28 USCS § 1332]. The parties agree that the law of Rhode Island applies to all substantive aspects of the action. See Erie R. Co. v Tompkins, supra.

At the close of plaintiff-respondent's case-in-chief, the District Court directed a verdict for the individual defendants on all three of the remaining claims, and for the college on the claims for intentional infliction of emotional distress and

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invasion of privacy. App 82. The court, however, denied the college's motion for a directed verdict on the breach-of-contract claim, reasoning that "a legitimate factual issue" remained concerning whether "there was substantial performance by the plaintiff in her overall contractual relationship at Salve Regina." Id., at 88.

At the close of all the evidence, the college renewed its motion for a directed verdict. It argued that under Rhode Island law the strict commercial doctrine of substantial performance did not apply in the general academic context. Therefore, according to petitioner, because respondent admitted she had not fulfilled the terms of the contract, the college was entitled to judgment as a matter of law.

The District Court denied petitioner's motion. Id., at 92. Acknowledging that the Supreme Court of Rhode Island, to that point, had limited the application of the substantial-performance doctrine to construction contracts, the District Court nonetheless concluded, as a matter of law, that the Supreme Court of Rhode Island would apply that doctrine to the facts of respondent's case. Id., at 90-91. The Federal District Judge based this conclusion, in part, on his observation that "I was a state trial judge for 18 and ½ years, and I have a feel for what the Rhode Island Supreme Court will do or won't do." Id., at 91. Accordingly, the District Court submitted the breach-of-contract claim to the jury. The court instructed the jury:

> "The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and

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1. The amended complaint named the college and five faculty members as defendants and alleged discrimination in violation of the Rehabilitation Act of 1973, 87 Stat 355, as amended, 29 USC § 701 et seq. [29 USCS §§ 701 et seq.]; denial of due process and unconstitutional interference with her liberty and property interests; negligent and intentional infliction of emotional distress; invasion of privacy; wrongful dismissal; violation of express and implied covenants of good faith and fair dealing; and breach of contract. The District Court entered summary judgment for the defendants except as to the three state-law claims for intentional infliction of emotional distress, invasion of privacy, and breach of contract. 649 F Supp 391, 407 (R.I. 1986). It determined that it need not consider "the plausibility of federal question jurisdiction." Id., at 393, n 1.

completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission." Id., at 97.

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The jury returned a verdict for respondent, and determined that the damages were $30,513.40. Id., at 113. Judgment was entered. Id., at 115. Both respondent and petitioner appealed.

The United States Court of Appeals for the First Circuit affirmed. 890 F2d 484 (1989). It first upheld the District Court's directed verdict dismissing respondent's claims for intentional infliction of emotional distress and invasion of privacy. Id., at 487-488. It then turned to petitioner's argument that the District Court erred in submitting the breach-of-contract claim to the jury. Rejecting petitioner's argument that, under Rhode Island law, the doctrine of substantial performance does not apply in the college-student context, the court stated:

"In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, Dennis v Rhode Island Hospital Trust Nat'l Bank, 744 F2d 893, 896 (1st Cir 1984); O'Rourke v Eastern Air Lines, Inc. 730 F2d 842, 847 (2d Cir 1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error." Id., at 489.

Petitioner college sought a writ of certiorari from this Court. It alleged that the Court of Appeals erred in deferring to the District Court's determination of state law.[2] A

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majority of the Courts of Appeals, although varying in their phraseology, embrace a rule of deference similar to that articulated by the Court of Appeals in this case. See, e.g., Norton v St. Paul Fire & Marine Ins. Co. 902 F2d 1355, 1357 (CA8 1990) ("In general, we accord substantial deference to a district court's interpretation of the law of the state in which it sits"), and Self v Wal-Mart Stores, Inc. 885 F2d 336, 339 (CA6 1989) ("[W]e should give 'considerable weight' to the trial court's views on such questions of local law"). Two Courts of Appeals, however, have broken ranks recently with their sister Circuits. They have concluded that a district-court determination of state law is subject to plenary review by the appellate court. See Craig v Lake Asbestos of Quebec, Ltd. 843 F2d 145, 148 (CA3 1988),

2. See Coenen, To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 Minn L Rev 899 (1989), and the many cases cited therein. See also Note, What is the Proper Standard for Reviewing a District Court's Interpretation of State Substantive Law?, 54 U Cin L Rev 215 (1985), and Note, A Nondeferential Standard for Appellate Review of State Law Decisions by Federal District Courts, 42 Wash & Lee L Rev 1311 (1985). See, however, Woods, The Erie Enigma: Appellate Review of Conclusions of Law, 26 Ariz L Rev 755 (1984), and Note, The Law/Fact Distinction and Unsettled State Law in the Federal Courts, 64 Texas L Rev 157 (1985).

and In re McLinn, 739 F2d 1395 (CA9 1984) (en banc, with a divided vote). We granted certiorari to resolve the conflict. 497 US 1023, 111 L Ed 2d 780, 110 S Ct 3269 (1990).

II

[1b, 3] We conclude that a court of appeals should review de novo a district court's determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. See 28 USC § 1291 [28 USCS § 1291]. The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.

[1c] Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus,

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trial judges often must resolve complicated legal questions without benefit of "extended reflection [or] extensive information." Coenen, To Defer or Not to Defer: a Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 Minn L Rev 899, 923 (1989).

Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multijudge panels, see 28 USC §§ 46(b) and (c) [28 USCS §§ 46(b) and (c)], that permit reflective dialogue and collective judgment. Over 30 years ago, Justice Frankfurter accurately observed:

> "Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions." Dick v New York Life Ins. Co. 359 US 437, 458-459, 3 L Ed 2d 935, 79 S Ct 921 (1959) (dissenting opinion).

Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review. Petitioner readily acknowledges the importance of a district court's reasoning to the appellate court's review. See Tr of Oral Arg 11, 19-22. Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court. If the court of appeals finds that the district court's analytical sophistica-

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and research have exhausted the state-law inquiry, little more need be said in the appellate opinion. Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of de novo review should encourage a district court to explicate with care the basis for its legal conclusions. See Fed Rule Civ Proc 52(a) (requiring the district court to "state separately its conclusions of law").

Those circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts. In deference to the unchallenged superiority of the district court's factfinding ability, Rule 52(a) commands that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In addition, it is "especially common" for issues involving supervision of litigation to be reviewed for abuse of discretion. See Pierce v Underwood, 487 US 552, 558, n 1, 101 L Ed 2d 490, 108 S Ct 2541 (1988). Finally, we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine. Miller v Fenton, 474 US 104, 114, 88 L Ed 2d 405, 106 S Ct 445 (1985); see also Cooter & Gell v Hartmarx Corp., 496 US 324, 402, 110 L Ed 2d 359, 110 S Ct 2447 (1990) ("[T]he district court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"); Pierce, 487 US, at 562, 101 L Ed 2d 490, 108 S Ct 2541 ("[T]he question whether the Government's litigating position has been 'substantially justified' is . . . a multifarious and novel question, little susceptible, for the time being at least, of useful generalization").

Nothing about the exercise of diversity jurisdiction alters these functional components of decisionmaking or otherwise

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warrants departure from a rule of independent appellate review. Actually, appellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in Erie. The twin aims of the Erie doctrine—"discouragement of forum-shopping and avoidance of inequitable administration of the laws," Hanna v Plumer, 380 US 460, 468, 14 L Ed 2d 8, 85 S Ct 1136 (1965)—are components of the goal of doctrinal coherence advanced by independent appellate review. As respondent has conceded, deferential appellate review invites divergent development of state law among the federal trial courts even within a single State. Tr of Oral Arg 34-36. Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. Cf. Erie, 304 US, at 74-75, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487 ("[The rule of

Swift v Tyson, 16 Pet 1, 10 L Ed 865 (1842)] made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court"). Neither of these results, unavoidable in the absence of independent appellate review, can be reconciled with the commands of Erie.

Although some might say that this Court has not spoken with a uniformly clear voice on the issue of deference to a district judge's determination of state law, a careful consideration of our cases makes apparent the duty of appellate courts to provide meaningful review of such a determination. In a series of cases decided soon after Erie, the Court noted that the appellate courts had applied general federal law instead of the law of the respective States, and remanded to the Courts of Appeals for consideration of the applicable principles of state law. See, e.g., New York Life Ins. Co. v Jackson, 304 US 261, 82 L Ed 1329, 58 S Ct 871 (1938), and Rosenthal v New York Life Ins. Co. 304 US 263, 82 L Ed 1330, 58 S Ct 874 (1938). It is true that in Bernhardt v Polygraphic Co. of America, 350 US 198, 100 L Ed 199, 76 S Ct 273 (1956),

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this Court remanded the case to the District Court for application of state law. The Court noted, however, that the law of the State was firmly settled, and emphasized: "Were the question in doubt or deserving further canvass, we would of course remand the case to the Court of Appeals to pass on this question of [state] law." Id., at 205, 100 L Ed 199, 76 S Ct 273.[3]

III

[1d] In urging this Court to adopt the deferential standard embraced by the majority of the Courts of Appeals, respondent offers two arguments. First, respondent suggests that the appellate courts professing adherence to the rule of deference actually are reviewing de novo the district court determinations of state law. Second, respondent presses the familiar contention that district judges are better arbiters of unsettled state law because they have exposure to the judicial system of the State in which they sit. We reject each of these arguments.

A

Respondent primarily contends that the Courts of Appeals that claim to accord special consideration to the District Court's state-law expertise actually undertake plenary review of a determination of state law. According to respondent, this is simply de novo review "cloth[ed] in 'deferential' robes." Brief for Respondent 15. In support of this contention, respondent refers to several decisions in which the appellate court has announced that it is bound to review deferentially a district court's determination of state law, yet nonetheless has found that determination to constitute reversible

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error. Afram Export Corp. v Metallurgiki Halyps, S. A. 772 F2d 1358,

3. The dissent inexplicably relies on several cases in which this Court declined to review de novo questions of state law to support the dissent's contention that it is "quite natural" for appellate judges to rely on the "experience" of district judges. See post, at 241-242, 113 L Ed 2d, at 204. We are not persuaded that the manner in which this Court chooses to expend its limited resources in the exercise of its discretionary jurisdiction has any relevance to the obligation of courts of appeals to review de novo those legal issues properly before them.

1370 (CA7 1985); Norton v St. Paul Fire & Marine Ins. Co., 902 F2d 1355 (CA8 1990). Respondent also relies on cases in which the Courts of Appeals, while articulating a rule of deference, acknowledge their obligation to scrutinize closely the District Court's legal conclusions. See Foster v National Union Fire Ins. Co. of Pittsburgh, 902 F2d 1316 (CA8 1990). See also In re McLinn, 739 F2d, at 1405 (dissenting opinion) ("The majority overreacts to a problem that is basically one of terminology").

We decline the invitation to assume that courts of appeals craft their opinions disingenuously. The fact that an appellate court overturns an erroneous determination of state law in no way indicates that the appellate court is not applying the rule of deference articulated in the opinion. The cases cited by respondent confirm this. In Foster, for example, the Court of Appeals articulated a rule of deference, yet cautioned: "We have not, however, failed to closely examine the matter ourselves." 902 F2d, at 1318. Respondent would have us interpret this caveat as an acknowledgment of the appellate court's obligation to review the state-law question de novo. See Brief for Respondent 17-18, and n 23. The Court of Appeals, however, expressly acknowledged that it would not reverse the District Court's determination "unless its analysis is 'fundamentally deficient . . . , without a reasonable basis, or contrary to a reported state-court opinion.' " Foster, 902 F2d, at 1318 (citations omitted). After reviewing the applicable law in some detail, the Court of Appeals concluded: "[T]he district court's interpretation of the applicable Arkansas law is certainly not deficient in analysis and is reasonable." Id., at 1320. This neither purports to be, nor is, a conclusion following from de novo review.

Nor does it suffice to recognize that little substantive difference may separate the form of deference articulated and applied by the several Courts of Appeals and the independent appellate review urged by petitioner. Respondent argues

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that the subtle differences between these standards are insufficient to warrant intrusion into the manner in which appellate courts review state-law determinations. A variation of this argument forms the framework upon which the dissent in McLinn rests. See 739 F2d, at 1404 ("By giving 'substantial deference,' or . . . 'great weight,' to the decisions of the district courts, appellate courts do not suspend their own thought processes").

As a practical matter, respondent and the dissent in McLinn frequently may be correct. We do not doubt that in many cases the application of a rule of deference in lieu of independent review will not affect the outcome of an appeal. In many diversity cases the controlling issues of state law will have been squarely resolved by the state courts, and a district court's adherence to the settled rule will be indisputably correct. See, e. g., Bernhardt, 350 US, at 204-205, 100 L Ed 199, 76 S Ct 273. In a case where the controlling question of state law remains unsettled, it is not unreasonable to assume that the considered judgment of the court of appeals frequently will coincide with the reasoned determination of the district court. Where the state-law determinations of the two courts diverge, the choice between these standards of review is of no significance if the appellate court

concludes that the district court was clearly wrong.[4]

Thus, the mandate of independent review will alter the appellate outcome only in those few cases where the appellate

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court would resolve an unsettled issue of state law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error. See, e.g., In re McLinn, 739 F2d, at 1397 ("The panel indicated that if the question of law were reviewed under the deferential standard that we have applied in the past, which permits reversal only for clear error, then they would affirm; but if they were to review the determination under an independent de novo standard, they would reverse"). These few instances, however, make firm our conviction that the difference between a rule of deference and the duty to exercise independent review is "much more than a mere matter of degree." Bose Corp. v Consumers Union of United States, 466 US 485, 501, 80 L Ed 2d 502, 104 S Ct 1949 (1984). When de novo review is compelled, no form of appellate deference is acceptable.

B

Respondent and her amicus also argue that de novo review is inappropriate because, as a general matter, a district judge is better positioned to determine an issue of state law than are the judges on the court of appeals. This superior capacity derives, it is said, from the regularity with which a district judge tries a diversity case governed by the law of the forum State, and from the extensive experience that the district judge generally has had as practitioner or judge in the forum State. See Brief for Respondent 7-10; Brief for Ford Motor Co. as Amicus Curiae 9-11.

We are unpersuaded. As an initial matter, this argument seems to us to be founded fatally on overbroad generalizations. Moreover, and more important, the proposition that a district judge is better able to "intuit" the answer to an unsettled question of state law is foreclosed by our holding in Erie. The very essence of the Erie doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge. Almost 35 years ago, Professor Kurland stated: "Certainly, if the law

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is not a brooding omnipresence in the sky over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California." Kurland, Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases, 67 Yale LJ 187, 217 (1957). See Southern Pacific Co. 244 US, at 222, 61 L Ed 1086, 37 S Ct 524 (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some

4. Of course, a question of state law usually can be resolved definitively if the litigation is instituted in state court and is not finally removed to federal court, or if a certification procedure is available and is successfully utilized. Rhode Island provides a certification procedure. See Rhode Island Supreme Court Rule 6 (1989).

See, however, Lehman Brothers v Schein, 416 US 386, 390-391, 40 L Ed 2d 215, 94 S Ct 1741 (1974) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court") (footnote omitted).

sovereign or quasi-sovereign that can be identified"). Similarly, the bases of state law are as equally communicable to the appellate judges as they are to the district judge. To the extent that the available state law on a controlling issue is so unsettled as to admit of no reasoned divination, we can see no sense in which a district judge's prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.[5]

IV

[1e] The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying Erie require that courts of appeals review the state-law determinations of district courts de novo. The Court of Appeals in this

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case therefore erred in deferring to the local expertise of the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Chief Justice **Rehnquist,** with whom Justice **White** and Justice **Stevens** join, dissenting.

I do not believe we need to delve into such abstractions as "deferential" review, on the one hand, as opposed to what the Court's opinion calls, at various places, "plenary," "independent," and "de novo" review, on the other, in order to decide this case. The critical language used by the Court of Appeals, and quoted in this Court's opinion, is this:

> "In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, Dennis v Rhode Island Hospital Trust Nat'l Bank, 744 F2d 893, 896 (1st Cir. 1984); O'Rourke v Eastern Air Lines, Inc. 730 F2d 842, 847 (2d Cir. 1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error." 890 F2d 484, 489 (CA1 1989).

In order to determine the Court of Appeals' views as to "customary appellate deference," it seems only fair to refer to the page in Dennis v Rhode Island Hospital Trust Nat. Bank, 744 F2d 893 (CA1 1984), to which the court cites. There we find this language:

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5. "As a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts frequently have voiced reluctance to substitute their own view of the state law for that of the district judge. As a matter of judicial administration, this seems defensible. But there is some tendency to go beyond that proposition and to say that if the trial court has reached a permissible conclusion under state law, the appellate court cannot reverse even if it thinks the state law to be otherwise, thereby treating the question of state law much as if it were a question of fact. The determination of state law, however, is a legal question, and although the considered decision of a district judge experienced in the law of a state naturally commands the respect of an appellate court, a party is entitled to meaningful review of that decision just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court." 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4507, pp 106-110 (1982) (footnotes omitted).

"[I]n a diversity case such as this one, involving a technical subject matter primarily of state concern, we are 'reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices.'" Id., at 896 (citation omitted).

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The court does not say that it *always* defers to a district court's conclusions of law. Rather, it states that it is reluctant to substitute its own view of state law for that of a judge "who is familiar with that state's law and practices." In this case, the court concluded that the opinion of a District Judge with 18½ years of experience as a trial judge was entitled to some appellate deference.

This seems to me a rather sensible observation. A district court's insights are particularly valuable to an appellate court in a case such as this where the state law is unsettled. In such cases, the courts' task is to try to *predict* how the highest court of that State would decide the question. A judge attempting to predict how a state court would rule must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that State. It therefore makes perfect sense for an appellate court judge with no local experience to accord special weight to a local judge's assessment of state court trends.

If we must choose among Justice Holmes' aphorisms to help decide this case, I would opt for his observation that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). And it does no harm to recall that the members of this Court have no monopoly on experience; judges of the courts of appeals and of the district courts surely possess it just as we do. That the experience of appellate judges should lead them to rely, in appropriate situations, on the experience of district judges who have practiced law in the State in which they sit before taking the bench seems quite natural.

For this very reason, this Court has traditionally given special consideration or "weight" to the district judge's perspective on local law. See Bernhardt v Polygraphic Co. of America, 350 US 198, 204, 100 L Ed 199, 76 S Ct 273 (1956) ("Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is"); United States v Hohri, 482 US 64, 74, n 6, 96 L Ed 2d 51, 107 S Ct 2246 (1987) ("[L]ocal

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federal district judges . . . are likely to be familiar with the applicable state law. . . . Indeed, a district judge's determination of a state-law question usually is reviewed with great deference"); Bishop v Wood, 426 US 341, 346, and n 10, 48 L Ed 2d 684, 96 S Ct 2074 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion").

But the Court today decides that this intuitively sensible deference is available only to this Court, and not to the courts of appeals. It then proceeds to instruct the courts of appeals and the district courts on their respective functions in the federal judicial system, and how they should go about exercising them. Questions of law are questions of

law, they are told, whether they be of state law or federal law, and must all be processed through an identical decisional mold.

I believe this analysis unduly compartmentalizes things which have up to now been left to common sense and good judgment. Federal courts of appeals perform a different role when they decide questions of state law than they do when they decide questions of federal law. In the former case, these courts are not sources of law but only reflections of the jurisprudence of the courts of a State. While in deciding novel federal questions, courts of appeals are likely to ponder the policy implications as well as the decisional law, only the latter need be considered in deciding questions of state law. To my mind, therefore, it not only violates no positive law but also is a sensible allocation of resources to recognize these differences by deferring to the views of the district court where such deference is felt warranted.

I think we run a serious risk that our reach will exceed our grasp when we attempt to impose a rigid logical framework on the courts of appeals in place of a less precise but tolerably well-functioning approach adopted by those courts. I agree with the Court that a court of appeals should not "abdicate"

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its obligation to decide questions of state law presented in a diversity case. But according weight to the conclusion of a particular district judge on the basis of his experience and special knowledge of state law, an appellate court does not "suspend [its] own thought processes." In re McLinn, 739 F2d 1395, 1404 (CA9 1984) (Schroeder, J., dissenting). I think the Court of Appeals did no more than that here, and I therefore dissent from the reversal of its judgment.

OPINION OF JUSTICE IN CHAMBERS

[499 US 1301]

TED CALVIN COLE, Petitioner

v

TEXAS

499 US 1301, 113 L Ed 2d 206, 111 S Ct 1407

[No. A-704 (90-7411)]

Decided March 18, 1991.

Decision: Application for stay of execution pending Supreme Court's disposition of certiorari petition, granted by Scalia, J.

SUMMARY

A petitioner seeking direct review of the judgment of Texas courts affirming his death sentence filed an application in the United States Supreme Court for a stay of execution, pending disposition of his petition for writ of certiorari to the Court of Criminal Appeals of Texas.

SCALIA, J., as Circuit Justice, granted the application for the reasons stated in the headnote below.

HEADNOTE

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal §§ 887, 913.10; Criminal Law § 96 — stay of execution of death sentence — certiorari petition on direct review — processing by Supreme Court — filing extension

An individual Justice of the United States Supreme Court, as Circuit Justice, will grant a stay of execution, pending disposition by the Supreme Court of the petition for writ of certiorari, in the case before the individual Justice—in which the petitioner sought direct review of the judgment of state courts affirming his death sentence—and in every capital case on direct review; while the time for filing a petition will not be extended beyond an established execution date, neither will a state's execution date be permitted to inter-

ANNOTATION REFERENCE

Stay of execution of death sentence by Supreme Court or Justice thereof. 78 L Ed 2d 914.

fere with the orderly processing of a petition on direct review by the Supreme Court. [Per Scalia, J., as Circuit Justice.]

OPINION

[499 US 1301]

Justice **Scalia,** Circuit Justice.

I have before me an application for a stay of execution pending disposition of a petition for writ of certiorari to the Court of Criminal Appeals of Texas. The petitioner seeks direct review of the judgment of the Texas courts affirming his death sentence.

I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari. While I will not extend the time for filing a petition beyond an established execution date, see Madden v Texas, 498 US 1301, 112 L Ed 2d 1026, 111 S Ct 902 (1991) (Scalia, J., in chambers), neither will I permit the State's execution date to interfere with the orderly processing of a petition on direct review by this Court.

It is so ordered.

MEMORANDUM CASES

No. 89-609. Donald Puckett, et al., Petitioners v Native Village of Tyonek, et al.

499 US 901, 113 L Ed 2d 208, 111 S Ct 1097.

March 4, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Oklahoma Tax Commission v Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 US 505, 112 L Ed 2d 1112, 111 S Ct 905 (1991).

Same case below, 883 F2d 1024.

No. 89-6932. Jerry Donald Mullis, Petitioner v United States; and John Victor Homich, Petitioner v United States

499 US 901, 113 L Ed 2d 208, 111 S Ct 1097.

March 4, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The motions of petitioners for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgments are vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Gozlon-Peretz v United States, 498 US 395, 112 L Ed 2d 919, 111 S Ct 840 (1991).

Same cases below, 887 F2d 1091 (first case) and 888 F2d 1395 (second case).

No. 90-892. City of Seattle, Petitioner v First Covenant Church of Seattle, Washington

499 US 901, 113 L Ed 2d 208, 111 S Ct 1097.

March 4, 1991. On petition for writ of certiorari to the Supreme Court of Washington. The motion of National Trust for Historic Preservation in the United States for leave to file a brief as amicus curiae is granted. The motion of Municipal Art Society of New York, Inc. for leave to file a brief as amicus curiae is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Washington for further consideration in light of Employment Division, Department of Human Resources of Oregon v Smith, 494 US 872, 108 L Ed 2d 876, 110 S Ct 1595 (1990).

Same case below, 114 Wash 2d 392, 787 P2d 1352.

No. D-948. In the Matter of Disbarment of Howard Leslie Perlow

March 4, 1991. Disbarment order entered.

499 US 901, 113 L Ed 2d 209, 111 S Ct 1097.

No. D-952. In the Matter of Disbarment of John W. Porter, Jr.

499 US 901, 113 L Ed 2d 209, 111 S Ct 1097.

March 4, 1991. Disbarment order entered.

No. D-953. In the Matter of Disbarment of Irving Alan Kanarek

499 US 901, 113 L Ed 2d 209, 111 S Ct 1098.

March 4, 1991. Disbarment order entered.

No. D-972. In the Matter of Disbarment of Edwin Adam Pennell

499 US 901, 113 L Ed 2d 209, 111 S Ct 1098.

March 4, 1991. It is ordered that Edwin Adam Pennell, of Dunnellon, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-973. In the Matter of Disbarment of Neil Arthur Shanzer

499 US 902, 113 L Ed 2d 209, 111 S Ct 1098.

March 4, 1991. It is ordered that Neil Arthur Shanzer, of Miami, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-974. In the Matter of Disbarment of Charles B. Bowers

499 US 902, 113 L Ed 2d 209, 111 S Ct 1098.

March 4, 1991. It is ordered that Charles B. Bowers, of Columbia, South Carolina, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-975. In the Matter of Disbarment of Richard A. Heidecke, Jr.

499 US 902, 113 L Ed 2d 209, 111 S Ct 1098.

March 4, 1991. It is ordered that Richard A. Heidecke, Jr., of Oak Brook, Illinois, be suspended from the practice of law in this Court and that a rule issue, returnable within

forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-976. In the Matter of Disbarment of David Alan Hess

499 US 902, 113 L Ed 2d 210, 111 S Ct 1099.

March 4, 1991. It is ordered that David Alan Hess, of Lubbock, Texas, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-977. In the Matter of Disbarment of Paul Zaharia

499 US 902, 113 L Ed 2d 210, 111 S Ct 1099.

March 4, 1991. It is ordered that Paul Zaharia, of Venice, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-978. In the Matter of Disbarment of Corrine Anderson McClure

499 US 902, 113 L Ed 2d 210, 111 S Ct 1099.

March 4, 1991. It is ordered that Corrine Anderson McClure, of Bradenton, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D-979. In the Matter of Disbarment of Donald Kent McShirley

499 US 902, 113 L Ed 2d 210, 111 S Ct 1099.

March 4, 1991. It is ordered that Donald Kent McShirley, of Sarasota, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-980. In the Matter of Disbarment of Randy Lamar Miller

499 US 903, 113 L Ed 2d 210, 111 S Ct 1099.

March 4, 1991. It is ordered that Randy Lamar Miller, of Raleigh, North Carolina, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-981. In the Matter of Disbarment of David L. Loving, III

499 US 903, 113 L Ed 2d 211, 111 S Ct 1099.

March 4, 1991. It is ordered that David L. Loving, III, of Dallas, Texas, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 112, Original. State of Wyoming, Plaintiff v State of Oklahoma

499 US 903, 113 L Ed 2d 211, 111 S Ct 1100.

March 4, 1991. The briefing schedule proposed by the Attorney General of Wyoming is adopted. Wyoming may file its brief on or before April 2, 1991. Oklahoma may file its brief on or before May 17, 1991. A reply brief may be filed on or before June 6, 1991.

No. 90-516. Jill S. Kamen, Petitioner v Kemper Financial Services, Inc., et al.

499 US 903, 113 L Ed 2d 211, 111 S Ct 1100.

March 4, 1991. The motion of Business Roundtable for leave to file a brief as amicus curiae is granted. The motion of Investment Company Institute for leave to file a brief as amicus curiae is granted.

No. 90-1102. Robert E. Gibson, Petitioner v Florida Bar, et al.

499 US 903, 113 L Ed 2d 211, 111 S Ct 1100.

March 4, 1991. The motion of Joseph W. Little for leave to file a brief as amicus curiae is denied.

No. 90-1280. Insurance Company of Pennsylvania, et al., Petitioners v Ben Cooper, Inc.

499 US 903, 113 L Ed 2d 211, 111 S Ct 1100.

March 4, 1991. The motion of the Solicitor General to expedite consideration of the petition for a writ of certiorari is denied.

No. 90-6669. Gary Zink, Petitioner v California State Board of Equalization

499 US 903, 113 L Ed 2d 211, 111 S Ct 1100.

March 4, 1991. The motion of petitioner for leave to proceed in forma pauperis is denied. Petitioner is allowed until March 25, 1991, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Justice Marshall, dissenting.

For the reasons expressed in Brown v Herald Co., Inc. 464 US 928, 78 L Ed 2d 301, 104 S Ct 331 (1983), I would deny the petition for a writ of certiorari without reaching

the merits of the motion to proceed in forma pauperis.

No. 90-1141. Rafeh-Rafie Ardestani, Petitioner v Immigration and Naturalization Service

499 US 904, 113 L Ed 2d 212, 111 S Ct 1101.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit granted.

Same case below, 904 F2d 1505.

No. 90-747. United States Department of State, Petitioner v Michael D. Ray, et al.

499 US 904, 113 L Ed 2d 212, 111 S Ct 1101.

March 4, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit granted. The cases are consolidated and a total of one hour is allotted for oral argument.

Same cases below, 900 F2d 852.

No. 90-913. Board of Governors of the Federal Reserve System of the United States, Petitioner v MCorp Financial, Inc., et al.

No. 90-914. MCorp, et al., Petitioners v Board of Governors of the Federal Reserve System of the United States

499 US 904, 113 L Ed 2d 212, 111 S Ct 1101.

No. 90-450. Thaddeus Favian Jackson, aka Charles Edward Jackson, Petitioner v Texas

499 US 904, 113 L Ed 2d 212, 111 S Ct 1101.

March 4, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, Fourteenth District, denied.

No. 90-464. Bituminous Coal Operators' Association, Inc., Petitioner v United Mine Workers of America, International Union, by Thomas Rabbit, Trustee ad Litem, et al.

499 US 904, 113 L Ed 2d 212, 111 S Ct 1102.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 902 F2d 1558.

No. 90-785. Stanley Simon, Petitioner v United States

No. 90-931. Mario Biaggi, Petitioner v United States

No. 90-937. Richard Biaggi, Petitioner v United States

499 US 904, 113 L Ed 2d 213, 111 S Ct 1102.

March 4, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same cases below, 909 F2d 662.

No. 90-803. John Doe, Petitioner v H. Lawrence Garrett, III, Secretary of the Navy, et al.

499 US 904, 113 L Ed 2d 213, 111 S Ct 1102.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 903 F2d 1455.

No. 90-825. Richard Joseph Lynn, Petitioner v United States

499 US 904, 113 L Ed 2d 213, 111 S Ct 1103.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-853. Bank of Boulder, Petitioner v Federal Deposit Insurance Corporation

499 US 904, 113 L Ed 2d 213, 111 S Ct 1103.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 911 F2d 1466.

No. 90-859. Brower's Moving & Storage, Inc., Petitioner v National Labor Relations Board, et al.

499 US 905, 113 L Ed 2d 213, 111 S Ct 1103.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 914 F2d 239.

No. 90-894. Reynold Leone, Administrator of the Estate of Andrea Leone, aka Andrea Held, Deceased, et al., Petitioners v United States

499 US 905, 113 L Ed 2d 213, 111 S Ct 1103.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 910 F2d 46.

No. 90-899. Committee to Oppose the Sale of St. Bartholomew's Church Incorporated, et al., Petitioners v Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church, et al.

No. 90-900. Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church, Petitioners v City of New York, et al.

499 US 905, 113 L Ed 2d 214, 111 S Ct 1103.

March 4, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same cases below, 914 F2d 348.

No. 90-905. Harold Friedman and Anthony Hughes, Petitioners v United States

499 US 905, 113 L Ed 2d 214, 111 S Ct 1104.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 908 F2d 974.

No. 90-909. Dial Corporation, Petitioner v Willis Day Properties, Inc., et al.

499 US 905, 113 L Ed 2d 214, 111 S Ct 1104.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 258.

No. 90-911. Interstate Brands Corporation, Butternut Bread Division, Petitioner v Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135

499 US 905, 113 L Ed 2d 214, 111 S Ct 1104.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 909 F2d 885.

No. 90-921. Linda B. Dorfmont, Petitioner v James P. Brown, Director, Department of Defense, et al.

499 US 905, 113 L Ed 2d 214, 111 S Ct 1104.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 913 F2d 1399.

No. 90-926. Michigan, et al., Petitioners v Interstate Commerce Commission, et al.

No. 90-966. Allied Delivery System, Inc., et al., Petitioners v Interstate Commerce Commission, et al.

499 US 905, 113 L Ed 2d 214, 111 S Ct 1104.

March 4, 1991. Petitions for writs

of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same cases below, 908 F2d 972.

No. 90-980. Federal Kemper Life Assurance Company, Petitioner v Edmund J. Bodine, Jr.

No. 90-1114. Edmund J. Bodine, Jr., Petitioner v Federal Kemper Life Assurance Company

499 US 905, 113 L Ed 2d 215, 111 S Ct 1105.

March 4, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same cases below, 912 F2d 1373.

No. 90-990. West Texas Transmission, L.P., Petitioner v Enron Corporation, et al.

499 US 906, 113 L Ed 2d 215, 111 S Ct 1105.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 907 F2d 1554.

No. 90-992. Nevada, et al., Petitioners v James D. Watkins, Secretary of Energy, et al.

499 US 906, 113 L Ed 2d 215, 111 S Ct 1105, reh den (US) 115 L Ed 2d 1012, 111 S Ct 2844.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 1545.

No. 90-998. Joseph L. Dean, Petitioner v United States

499 US 906, 113 L Ed 2d 215, 111 S Ct 1106.

March 4, 1991. Petition for writ of certiorari to the United States Court of Military Appeals denied.

Same case below, 31 MJ 196.

No. 90-1062. Rainbow Navigation, Inc., et al., Petitioners v Department of the Navy, et al.

499 US 906, 113 L Ed 2d 215, 111 S Ct 1106.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 286 US App DC 55, 911 F2d 797.

No. 90-1071. Barbara Buffington, Individually and as Personal Representative of the Estate of James E. Buffington, Deceased, et al., Petitioners v Baltimore County, Maryland, et al.

No. 90-1123. Donald Gaigalas, et al., Petitioners v Barbara Buffington, Individually and as Personal Representative of the Estate of James E. Buffington, Deceased, et al.

499 US 906, 113 L Ed 2d 216, 111 S Ct 1106.

March 4, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same cases below, 913 F2d 113.

No. 90-1096. Rosalind Merriweather, Petitioner v International Business Machines

499 US 906, 113 L Ed 2d 216, 111 S Ct 1106.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 908 F2d 973.

No. 90-1098. Jeffrey Scott Buswell, Petitioner v Minnesota

No. 90-1099. Gary Lee Schwartzman, Petitioner v Minnesota

499 US 906, 113 L Ed 2d 216, 111 S Ct 1107.

March 4, 1991. Petitions for writs of certiorari to the Supreme Court of Minnesota denied.

Same cases below, 460 NW2d 614.

No. 90-1105. Jerome H. Bradshaw, et al., Petitioners v Pantry Pride Enterprises, Inc.

499 US 906, 113 L Ed 2d 216, 111 S Ct 1107.

March 4, 1991. Petition for writ of certiorari to the District Court of Appeal of Florida, Third District, denied.

Same case below, 566 So 2d 1306.

No. 90-1107. Michael R. McGuire, Petitioner v Washington, et al.

499 US 906, 113 L Ed 2d 216, 111 S Ct 1107.

March 4, 1991. Petition for writ of certiorari to the Court of Appeals of Washington, Division 2, denied.

Same case below, 58 Wash App 195, 791 P2d 929.

No. 90-1109. Thomas Lynn Smith, Petitioner v Harbor Towing & Fleeting, Inc., et al.

499 US 906, 113 L Ed 2d 216, 111 S Ct 1107.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 910 F2d 312.

No. 90-1111. Stanley Robinson, Petitioner v Illinois

499 US 906, 113 L Ed 2d 217, 111 S Ct 1107.

March 4, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

Same case below, 199 Ill App 3d 1102, 585 NE2d 649.

No. 90-1115. Correale F. Stevens, District Attorney of Luzerne County, Pennsylvania, Petitioner v M. Russell Buchanan

499 US 907, 113 L Ed 2d 217, 111 S Ct 1108.

March 4, 1991. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied.

Same case below, 525 Pa 413, 581 A2d 172.

No. 90-1117. Metropolitan Dade County, Florida, et al., Petitioners v Carrie Meek, et al.

499 US 907, 113 L Ed 2d 217, 111 S Ct 1108.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 908 F2d 1540.

No. 90-1128. Gloria E. Kirby, Personal Representative of the Estate of Roy A. Kirby, Sr., Deceased, Petitioner v OMI Corp.

499 US 907, 113 L Ed 2d 217, 111 S Ct 1108.

March 4, 1991. Petition for writ of certiorari to the District Court of Appeal of Florida, First District, denied.

Same case below, 561 So 2d 666.

No. 90-1132. Johnny C. Cooksey, Petitioner v Ellis H. Abrams, et al.

499 US 907, 113 L Ed 2d 217, 111 S Ct 1108.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 914 F2d 269.

No. 90-1133. Edward R. Wyatt, Petitioner v Robin S. Thomas, et al.

499 US 907, 113 L Ed 2d 217, 111 S Ct 1108.

March 4, 1991. Petition for writ of certiorari to the Supreme Court of Virginia denied.

No. 90-1140. Hubert Garrie, Petitioner v James L. Gray, Inc.

499 US 907, 113 L Ed 2d 218, 111 S Ct 1108.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 912 F2d 808.

No. 90-1144. Birendra Mohan Sharma, et al., Petitioners v Skaarup Ship Management Corporation, et al.

499 US 907, 113 L Ed 2d 218, 111 S Ct 1109.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 916 F2d 820.

No. 90-1155. Howard A. Fromson, Petitioner v Western Litho Plate and Supply Company, et al.

499 US 907, 113 L Ed 2d 218, 111 S Ct 1109.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 909 F2d 1495.

No. 90-1171. Community National Bank, Petitioner v Richard W. Sherk, Jr.

499 US 907, 113 L Ed 2d 218, 111 S Ct 1109.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 560.

No. 90-1233. James M. Keohane, Petitioner v United States

499 US 907, 113 L Ed 2d 218, 111 S Ct 1109.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 918 F2d 273.

No. 90-5405. David R. Brundage, Petitioner v United States

499 US 907, 113 L Ed 2d 218, 111 S Ct 1109.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 284 US App DC 219, 903 F2d 837.

No. 90-5962. Ira Joe Carter, Petitioner v Texas

499 US 907, 113 L Ed 2d 218, 111 S Ct 1110.

March 4, 1991. Petition for writ of

certiorari to the Court of Appeals of Texas, Tenth District, denied.

No. 90-6185. Gustavo Larios Cortes, Petitioner v Anthony Belaski, Warden, et al.

499 US 907, 113 L Ed 2d 219, 111 S Ct 1110, reh den (US) 114 L Ed 2d 91, 111 S Ct 1697.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-6241. Raymond Paris, Petitioner v Virginia

499 US 907, 113 L Ed 2d 219, 111 S Ct 1110.

March 4, 1991. Petition for writ of certiorari to the Supreme Court of Virginia denied.

No. 90-6252. David Gallman, Petitioner v United States

499 US 908, 113 L Ed 2d 219, 111 S Ct 1110.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 907 F2d 639.

No. 90-6391. Phillip Woody, Petitioner v United States

499 US 908, 113 L Ed 2d 219, 111 S Ct 1110.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 909 F2d 1485.

No. 90-6453. David Patrick Durden, Petitioner v United States

499 US 908, 113 L Ed 2d 219, 111 S Ct 1110.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 907 F2d 1142.

No. 90-6465. Daniel Joseph Boyer, Petitioner v United States

499 US 908, 113 L Ed 2d 219, 111 S Ct 1110.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 914 F2d 144.

No. 90-6470. Olga Torres, Petitioner v United States

499 US 908, 113 L Ed 2d 219, 111 S Ct 1111.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 917 F2d 568.

No. 90-6473. Jose Angel Reyes-Resendez, Petitioner v United States

499 US 908, 113 L Ed 2d 220, 111 S Ct 1111.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 908 F2d 281.

No. 90-6486. Aurora M. Guiang, Petitioner v Office of Personnel Management

499 US 908, 113 L Ed 2d 220, 111 S Ct 1111.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 907 F2d 159.

No. 90-6499. Zenon Juarez Hernandez, Petitioner v United States

499 US 908, 113 L Ed 2d 220, 111 S Ct 1111.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 913 F2d 1506.

No. 90-6513. Elvoid Walker, Petitioner v Department of the Air Force

499 US 908, 113 L Ed 2d 220, 111 S Ct 1111.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 907 F2d 159.

No. 90-6532. Joseph E. L. Sullivan, Petitioner v United States

499 US 908, 113 L Ed 2d 220, 111 S Ct 1112.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 1493.

No. 90-6647. Wayne Washington, Petitioner v United States

499 US 908, 113 L Ed 2d 220, 111 S Ct 1112.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 283 US App DC 244, 899 F2d 52.

No. 90-6691. Samuel Smith, Petitioner v Curtis Scott, Warden

499 US 908, 113 L Ed 2d 221, 111 S Ct 1112.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 917 F2d 569.

No. 90-6692. Harold Royal, Petitioner v Exxon Chemical U.S.A., Chemical Department

499 US 908, 113 L Ed 2d 221, 111 S Ct 1112, reh den (US) 114 L Ed 2d 91, 111 S Ct 1698.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 90-6693. Wayne Arthur Young, Petitioner v United States District Court for the Eastern District of California

499 US 908, 113 L Ed 2d 221, 111 S Ct 1112.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6696. Peter C. Smith, Petitioner v Joseph Petrovsky, Warden, et al.

499 US 908, 113 L Ed 2d 221, 111 S Ct 1112.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 914 F2d 269.

No. 90-6697. Daries Sherrills, Petitioner v Ann Aldrich, et al.

499 US 909, 113 L Ed 2d 221, 111 S Ct 1113.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-6714. Edward J. Moore, Petitioner v Department of Veterans Affairs, et al.

499 US 909, 113 L Ed 2d 221, 111 S Ct 1113.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

No. 90-6720. Julian Scott Esparza, Petitioner v S. O. Woods

499 US 909, 113 L Ed 2d 221, 111 S Ct 1113, reh den (US) 114 L Ed 2d 91, 111 S Ct 1698.

March 4, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Fifth Circuit denied.

Same case below, 920 F2d 929.

No. 90-6721. Randall G. Evans, Petitioner v Richard V. Mecum

499 US 909, 113 L Ed 2d 222, 111 S Ct 1113.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-6724. Terry Turner, Petitioner v Harold Falk, Director, Hawaii Department of Corrections, et al.

499 US 909, 113 L Ed 2d 222, 111 S Ct 1113, reh den 499 US 971, 113 L Ed 2d 673, 111 S Ct 1612.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6728. Michael Dixon, Petitioner v Jack R. Duckworth, Warden

499 US 909, 113 L Ed 2d 222, 111 S Ct 1113, reh den 499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 917 F2d 1306.

No. 90-6729. Franklin L. Miller, Petitioner v Brian G. Saylin, et al.

499 US 909, 113 L Ed 2d 222, 111 S Ct 1114.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 145.

No. 90-6732. Ralph Lepiscopo, Petitioner v Robert J. Tansy, et al.

499 US 909, 113 L Ed 2d 222, 111 S Ct 1114.

March 4, 1991. Petition for writ of certiorari to the Supreme Court of New Mexico denied.

No. 90-6736. Thomas Earl Jones, Petitioner v Thomas J. Ervin, et al.

499 US 909, 113 L Ed 2d 222, 111 S Ct 1114.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1301.

No. 90-6742. Arnold D. Mackey, Petitioner v Marlene J. Mackey

499 US 909, 113 L Ed 2d 222, 111 S Ct 1114, reh den 499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

March 4, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 1494.

No. 90-6748. Arthur T. Davidson, Petitioner v Herik Bendixen, et al.

499 US 909, 113 L Ed 2d 223, 111 S Ct 1114.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 916 F2d 709.

No. 90-6753. Donald Turnpaugh, Petitioner v Robert Redman, Warden

499 US 909, 113 L Ed 2d 223, 111 S Ct 1114.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-6755. Herbert Gilbert, Petitioner v Joseph Bodovitz, et al.

499 US 909, 113 L Ed 2d 223, 111 S Ct 1114, reh den (US) 114 L Ed 2d 92, 111 S Ct 1698.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 902 F2d 1578.

No. 90-6765. Carson Lynn Brown, Petitioner v Theodore H. Koehler

499 US 909, 113 L Ed 2d 223, 111 S Ct 1115, reh den 499 US 971, 113 L Ed 2d 674, 111 S Ct 1612.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-6768. Ernest L. Moye, Petitioner v Cigna Corporation

499 US 909, 113 L Ed 2d 223, 111 S Ct 1115.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 845.

No. 90-6774. Juan Luis Garcia, Petitioner v Iowa

499 US 909, 113 L Ed 2d 223, 111 S Ct 1115.

March 4, 1991. Petition for writ of

certiorari to the Supreme Court of Iowa denied.

Same case below, 461 NW2d 460.

No. 90-6781. Robert Felton, Jr., Petitioner v Bruce N. Lynn, Secretary, Department of Corrections, Louisiana, et al.

499 US 910, 113 L Ed 2d 224, 111 S Ct 1115.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 90-6782. Harry Ray Grubb, Petitioner v Virginia

499 US 910, 113 L Ed 2d 224, 111 S Ct 1115.

March 4, 1991. Petition for writ of certiorari to the Supreme Court of Virginia denied.

No. 90-6788. Arthur W. Byrd, Petitioner v United States

499 US 910, 113 L Ed 2d 224, 111 S Ct 1115.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 911 F2d 734.

No. 90-6800. Rinee Stephen Smith, Petitioner v United States, et al.

499 US 910, 113 L Ed 2d 224, 111 S Ct 1116.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 562.

No. 90-6813. Theodore M. Leonard, Petitioner v ABC Unified School District, et al.

499 US 910, 113 L Ed 2d 224, 111 S Ct 1116.

March 4, 1991. Petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, denied.

No. 90-6814. Young Il Kawano, aka Eiichi Sai, et al., Petitioners v Commonwealth of the Northern Mariana Islands

499 US 910, 113 L Ed 2d 224, 111 S Ct 1116.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 379.

No. 90-6826. Elder Samuel Chambers, Petitioner v James Maher

499 US 910, 113 L Ed 2d 225, 111 S Ct 1116.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 915 F2d 1141.

No. 90-6852. Ronnie Smith, Petitioner v Margarett Bingham, et al.

499 US 910, 113 L Ed 2d 225, 111 S Ct 1116.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 914 F2d 740.

No. 90-6866. Corey Keith Woodard, Petitioner v United States

499 US 910, 113 L Ed 2d 225, 111 S Ct 1117.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 29.

No. 90-6873. Emerson Clapper, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

499 US 910, 113 L Ed 2d 225, 111 S Ct 1117.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 562.

No. 90-6876. John Winters, Petitioner v First Federal Savings and Loan of Raleigh

499 US 910, 113 L Ed 2d 225, 111 S Ct 1117.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 912 F2d 464.

No. 90-6895. Demetrio Zepeda Soto, Petitioner v United States

499 US 910, 113 L Ed 2d 225, 111 S Ct 1117.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 29.

No. 90-6909. James Edward Norris, Petitioner v Federal Bureau of Investigation

499 US 910, 113 L Ed 2d 226, 111 S Ct 1117, reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 263.

No. 90-6916. Preston Bryant, Petitioner v United States

499 US 910, 113 L Ed 2d 226, 111 S Ct 1117.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 918 F2d 174.

No. 90-6921. Jeffrey Dean Becker, Petitioner v United States

499 US 911, 113 L Ed 2d 226, 111 S Ct 1118.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 568.

No. 90-6937. Charles M. Kunz, Petitioner v United States

499 US 911, 113 L Ed 2d 226, 111 S Ct 1118.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 28.

No. 90-6947. Pamela Scholes, Petitioner v United States

499 US 911, 113 L Ed 2d 226, 111 S Ct 1118.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 564.

No. 90-6955. Terrence I. Broxton, Petitioner v United States

499 US 911, 113 L Ed 2d 226, 111 S Ct 1118.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 288 US App DC 307, 926 F2d 1180.

No. 90-6956. Catarino Murillo, Petitioner v United States

499 US 911, 113 L Ed 2d 226, 111 S Ct 1118.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 898 F2d 156.

No. 90-6960. Floyd Coleman, Petitioner v Charlie Jones, Warden, et al.

499 US 911, 113 L Ed 2d 227, 111 S Ct 1118.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 909 F2d 447.

No. 90-6963. Thomas C. McGirr, Petitioner v United States

499 US 911, 113 L Ed 2d 227, 111 S Ct 1119.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 918 F2d 176.

No. 90-6964. Diego Campo, Petitioner v United States

499 US 911, 113 L Ed 2d 227, 111 S Ct 1119.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 741.

No. 90-6966. Lesester Duva McDougherty, Petitioner v United States

499 US 911, 113 L Ed 2d 227, 111 S Ct 1119.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 920 F2d 569.

No. 90-6968. Harry Bout, Petitioner v Michigan Department of Corrections

499 US 911, 113 L Ed 2d 227, 111 S Ct 1119.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 915 F2d 1570.

No. 90-6971. Julia Murray Rhinehart, Petitioner v United States

499 US 911, 113 L Ed 2d 227, 111 S Ct 1119.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 23.

No. 90-6980. Ildefonso Reina-Herrera, Petitioner v United States

499 US 911, 113 L Ed 2d 228, 111 S Ct 1119.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 891 F2d 296.

No. 90-6981. Carl Jerome Singleton, Petitioner v United States

499 US 911, 113 L Ed 2d 228, 111 S Ct 1120.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 918 F2d 956.

No. 90-6985. John Jairo Aguirre, Petitioner v United States

499 US 911, 113 L Ed 2d 228, 111 S Ct 1120.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 922 F2d 848.

No. 90-6988. George R. "Mike" McCray, Petitioner v United States

499 US 911, 113 L Ed 2d 228, 111 S Ct 1120.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 1497.

No. 90-6990. Jeffrey Mullins, Petitioner v United States

499 US 912, 113 L Ed 2d 228, 111 S Ct 1120.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 922 F2d 842.

No. 90-6998. Eugene Englebrecht, Petitioner v United States

499 US 912, 113 L Ed 2d 228, 111 S Ct 1120.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 917 F2d 376.

No. 90-7005. Relious Essix Glasco, Petitioner v United States

499 US 912, 113 L Ed 2d 228, 111 S Ct 1120.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 797.

No. 90-7008. Melvin Wright, Petitioner v James E. Sullivan, Superintendent, Sing Sing Correctional Facility

499 US 912, 113 L Ed 2d 229, 111 S Ct 1121.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 844.

No. 90-7010. Lupe Montes-Gonzalez, Petitioner v United States

499 US 912, 113 L Ed 2d 229, 111 S Ct 1121.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 919 F2d 736.

No. 90-7011. Roy Lee Hagood, Petitioner v United States

499 US 912, 113 L Ed 2d 229, 111 S Ct 1121.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1302.

No. 90-7014. Howard Wayne Hicks, Jr., Petitioner v Kentucky

499 US 912, 113 L Ed 2d 229, 111 S Ct 1121.

March 4, 1991. Petition for writ of certiorari to the Circuit Court of Kentucky, McCracken County, denied.

No. 90-7015. Brian John Olsvik, Petitioner v United States

499 US 912, 113 L Ed 2d 229, 111 S Ct 1121.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 470.

No. 90-7026. Louismeme Louis, Petitioner v Florida

499 US 912, 113 L Ed 2d 229, 111 S Ct 1121.

March 4, 1991. Petition for writ of certiorari to the District Court of Appeal of Florida, Second District, denied.

Same case below, 572 So 2d 916.

No. 90-7036. Donald Alan Welky, Petitioner v John Prelesnik, Warden

499 US 912, 113 L Ed 2d 230, 111 S Ct 1122, reh den 499 US 971, 113 L Ed 2d 674, 111 S Ct 1613.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-7049. Anthony Samel, Petitioner v John Jabe, Warden

499 US 912, 113 L Ed 2d 230, 111 S Ct 1122.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 958.

No. 89-2026. Motor Vehicle Manufacturers Association of the United States, Inc., et al., Petitioners v Robert Abrams, Attorney General of New York

499 US 912, 113 L Ed 2d 230, 111 S Ct 1122.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Justice White and Justice Blackmun would grant certiorari.

Same case below, 899 F2d 1315.

No. 90-944. Roland M., et ux., Petitioners v Concord School Committee, et al.

499 US 912, 113 L Ed 2d 230, 111 S Ct 1122.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied. Justice Souter took no part in the consideration or decision of this petition.

Same case below, 910 F2d 983.

No. 90-1104. NAACP, Detroit Branch, et al., Petitioners v Detroit Police Officers Association, et al.

499 US 913, 113 L Ed 2d 230, 111 S Ct 1122.

March 4, 1991. The motion of Society of American Law Teachers, et al. for leave to file a brief as amici curiae is granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 1494.

No. 90-1121. Joan Godlove, Petitioner v Bamberger, Foreman, Oswald and Hahn, et al.

499 US 913, 113 L Ed 2d 230, 111 S Ct 1123.

March 4, 1991. The motion of petitioner to file corrected petition for writ of certiorari is granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 903 F2d 1145.

No. 90-6383. Patrick Bruce Gordon, Petitioner v California

499 US 913, 113 L Ed 2d 231, 111 S Ct 1123.

March 4, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

Same case below, 50 Cal 3d 1223, 792 P2d 251.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6540. Albert J. Clozza, Petitioner v Edward W. Murray, Director, Virginia Department of Corrections

499 US 913, 113 L Ed 2d 231, 111 S Ct 1123.

March 4, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 913 F2d 1092.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6628. Kirt Douglas Wainwright, Petitioner v Arkansas

499 US 913, 113 L Ed 2d 231, 111 S Ct 1123.

March 4, 1991. Petition for writ of certiorari to the Supreme Court of Arkansas denied.

Same case below, 302 Ark 371, 790 SW2d 420.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6351. In Re Frederick W. Bauer, Petitioner

499 US 904, 113 L Ed 2d 231, 111 S Ct 1124, reh den (US) 114 L Ed 2d 91, 111 S Ct 1698.

March 4, 1991. The petition for writ of mandamus is denied.

No. 90-6694. In Re George Sassower, Petitioner

499 US 904, 113 L Ed 2d 232, 111 S Ct 1124.

March 4, 1991. The petition for writ of mandamus and/or prohibition is denied.

No. 90-5701. Lawrence Arnolie, Jr., Petitioner v Secretary of the Navy

499 US 913, 113 L Ed 2d 232, 111 S Ct 1124.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1049, 112 L Ed 2d 778, 111 S Ct 758.

No. 90-5961. Leroy Pletten, Petitioner v Merit Systems Protection Board, et al.

499 US 913, 113 L Ed 2d 232, 111 S Ct 1124.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1053, 112 L Ed 2d 787, 111 S Ct 768.

No. 90-6189. George Srubar, Petitioner v United States

499 US 913, 113 L Ed 2d 232, 111 S Ct 1124.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1049, 112 L Ed 2d 779, 111 S Ct 760.

No. 90-6205. Luke Aaron Scott, Petitioner v California

499 US 913, 113 L Ed 2d 232, 111 S Ct 1124.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1050, 112 L Ed 2d 780, 111 S Ct 760.

No. 90-6215. Juan L. Steward, Petitioner v H. Lawrence Garrett, III, Secretary of the Navy, et al.

499 US 913, 113 L Ed 2d 232, 111 S Ct 1124.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1035, 112 L Ed 2d 690, 111 S Ct 700.

No. 90-6285. Jack Frost, Petitioner v California

499 US 913, 113 L Ed 2d 232, 111 S Ct 1125.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1051, 112 L Ed 2d 783, 111 S Ct 764.

No. 90-6341. Garry David Gallardo, Petitioner v United States

499 US 913, 113 L Ed 2d 232, 111 S Ct 1125.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1038, 112 L Ed 2d 696, 111 S Ct 707.

No. 90-6359. Russell A. Muth, Jr., Petitioner v Central Bucks School District, et al.

499 US 913, 113 L Ed 2d 233, 111 S Ct 1125.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1052, 112 L Ed 2d 784, 111 S Ct 764.

No. 90-6373. Joyce E. Richards and James L. Martin, Petitioners v Medical Center of Delaware, Inc., et al.

499 US 913, 113 L Ed 2d 233, 111 S Ct 1125.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1072, 112 L Ed 2d 857, 111 S Ct 796.

No. 90-6395. Huey Wright, Petitioner v New York

499 US 913, 113 L Ed 2d 233, 111 S Ct 1125.

March 4, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1073, 112 L Ed 2d 859, 111 S Ct 798.

No. 89-1363. United States, Petitioner v Darlina K. France

499 US 914, 113 L Ed 2d 233, 111 S Ct 1125.

March 4, 1991. The petition for rehearing is denied. Justice Souter took no part in the consideration or decision of this petition.

Former Decision, 498 US 335, 112 L Ed 2d 836, 111 S Ct 805.

No. 88-1483. Clayton Brokerage Co. of St. Louis, Inc., Petitioner v David T. Jordan

499 US 914, 113 L Ed 2d 233, 111 S Ct 1298.

March 18, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

Same case below, 861 F2d 172.

No. 89-1303. Reserve Life Insurance Company, Petitioner v Patricia Stephenson Eichenseer

499 US 914, 113 L Ed 2d 233, 111 S Ct 1298.

March 18, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is

vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

Same case below, 881 F2d 1355.

No. 89-1315. Hospital Authority of Gwinnett County, Georgia, Individually and dba Gwinnett Ambulance Services, Petitioner v R. Stanford Jones, Administrator of the Estate of William Harold O'Kelley, Deceased

499 US 914, 113 L Ed 2d 234, 111 S Ct 1298.

March 18, 1991. On petition for writ of certiorari to the Supreme Court of Georgia. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

Same case below, 259 Ga 759, 386 SE2d 120.

No. 89-1361. Church of Scientology of California, Petitioner v Larry Wollersheim

499 US 914, 113 L Ed 2d 234, 111 S Ct 1298.

March 18, 1991. On petition for writ of certiorari to the Court of Appeal of California, Second Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

Same case below, 212 Cal App 3d 872, 260 Cal Rptr 331.

No. 89-1399. International Society for Krishna Consciousness of California, et al., Petitioners v Robin George, et al.

499 US 914, 113 L Ed 2d 234, 111 S Ct 1299.

March 18, 1991. On petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Fourth Appellate District, for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

No. 90-324. Brown Group, Inc., dba Brown Shoe Company, Inc., Petitioner v Kenneth G. Hicks

499 US 914, 113 L Ed 2d 234, 111 S Ct 1299.

March 18, 1991. On petition for writ of certiorari to the United States Court of Appeals for the

Eighth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of that court's en banc opinion to be filed in Taggart v Jefferson County Child Support Enforcement Unit, 915 F2d 396 (1990), rehearing en banc granted December 11, 1990.

Same case below, 902 F2d 630.

No. 90-626. Pacific Lighting Corporation, et al., Petitioners v MGW, Inc.

499 US 915, 113 L Ed 2d 235, 111 S Ct 1299.

March 18, 1991. On petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Fourth Appellate District, for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

No. 90-827. Portec, Inc., Petitioner v The Post Office

499 US 915, 113 L Ed 2d 235, 111 S Ct 1299.

March 18, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

Same case below, 913 F2d 802.

No. 90-953. City Gas Company of Florida, Petitioner v Consolidated Gas Company of Florida, Inc.

499 US 915, 113 L Ed 2d 235, 111 S Ct 1300.

March 18, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The motion of Florida Public Service Commission for leave to file a brief as amicus curiae is granted. The motion of Edison Electric Institute for leave to file a brief as amicus curiae is granted. The motion of American Gas Association for leave to file a brief as amicus curiae is granted. The motion of National Association of Regulatory Utility Commissioners for leave to file a brief as amicus curiae is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit with directions to dismiss. United States v Munsingwear, Inc., 340 US 36, 95 L Ed 36, 71 S Ct 104 (1950).

Same case below, 912 F2d 1262.

No. ——. Robert M. Barritt, Petitioner v Adams TV of Wheeling, Inc., et al.

499 US 915, 113 L Ed 2d 236, 111 S Ct 1300.

March 18, 1991. The motion to direct the Clerk to file a petition for a writ of certiorari, out-of-time, is denied.

No. A-632. In Re Gayle Slaughter

499 US 915, 113 L Ed 2d 236, 111 S Ct 1300.

March 18, 1991. The application for stay, addressed to Justice Marshall and referred to the Court, is denied.

No. A-680 (90-7246). Roberto Jose Maldonado-Rivera, Petitioner v United States

499 US 915, 113 L Ed 2d 236, 111 S Ct 1304.

March 18, 1991. The application for further stay of mandate of the United States Court of Appeals for the Second Circuit, presented to Justice Marshall, and by him referred to the Court, is denied.

No. D-915. In the Matter of Disbarment of Bruce G. Kokernak

499 US 915, 113 L Ed 2d 236, 111 S Ct 1300.

March 18, 1991. Disbarment order entered.

No. D-924. In the Matter of Disbarment of Charles Lionel Parker

499 US 915, 113 L Ed 2d 236, 111 S Ct 1300.

March 18, 1991. Disbarment order entered.

No. D-925. In the Matter of Disbarment of H. J. M. Melaro

499 US 916, 113 L Ed 2d 236, 111 S Ct 1300.

March 18, 1991. Disbarment order entered.

No. D-949. In the Matter of Disbarment of Jim L. Wilson

499 US 916, 113 L Ed 2d 236, 111 S Ct 1301.

March 18, 1991. Disbarment order entered.

No. D-960. In the Matter of Disbarment of Kenneth Lynn Broadhurst

499 US 916, 113 L Ed 2d 236, 111 S Ct 1301.

March 18, 1991. Disbarment order entered.

No. D-961. In the Matter of Disbarment of Theodore A. Miller

499 US 916, 113 L Ed 2d 237, 111 S Ct 1301.

March 18, 1991. Disbarment order entered.

No. D-982. In the Matter of Disbarment of Alfonso Nathaniel Pearson

499 US 916, 113 L Ed 2d 237, 111 S Ct 1301.

March 18, 1991. It is ordered that Alfonso Nathaniel Pearson, of Burnwell, Alabama, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-983. In the Matter of Disbarment of Clyde W. Stitt

499 US 916, 113 L Ed 2d 237, 111 S Ct 1301.

March 18, 1991. It is ordered that Clyde W. Stitt, of San Francisco, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 117, Original. State of Mississippi, Plaintiff v United States, et al.

499 US 916, 113 L Ed 2d 237, 111 S Ct 1301, reh den (US) 114 L Ed 2d 130, 111 S Ct 2046.

March 18, 1991. The motion for leave to file a bill of complaint is denied.

No. 89-1895. Astoria Federal Savings and Loan Association, Petitioner v Angelo J. Solimino

499 US 916, 113 L Ed 2d 237, 111 S Ct 1302.

March 18, 1991. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 89-1905. Wisconsin Public Intervenor, et al., Petitioners v Ralph Mortier, et al.

499 US 916, 113 L Ed 2d 237, 111 S Ct 1302.

March 18, 1991. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 90-34. Exxon Corporation, Petitioner v Central Gulf Lines, Inc., et al.

499 US 916, 113 L Ed 2d 237, 111 S Ct 1302.

March 18, 1991. The motion of the Solicitor General for leave to partici-

pate in oral argument as amicus curiae and for divided argument is granted.

No. 90-368. Sheldon Baruch Toibb, Petitioner v Stuart J. Radloff

499 US 916, 113 L Ed 2d 238, 111 S Ct 1302.

March 18, 1991. The motion of the Solicitor General for divided argument is granted.

No. 90-659. Keith R. Gollust, et al., Petitioners v Ira L. Mendell, et al.

499 US 916, 113 L Ed 2d 238, 111 S Ct 1302.

March 18, 1991. The motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 90-769. Louise H. Renne, San Francisco City Attorney, et al., Petitioners v Bob Geary, et al.

499 US 917, 113 L Ed 2d 238, 111 S Ct 1303.

March 18, 1991. The motion of California Judges Association for leave to file a brief as amicus curiae is granted.

No. 90-889. William "Sky" King, Petitioner v St. Vincent's Hospital

499 US 917, 113 L Ed 2d 238, 111 S Ct 1303.

March 18, 1991. The motion of the Solicitor General to dispense with printing the joint appendix is granted.

No. 90-906. Metropolitan Washington Airports Authority, et al., Petitioners v Citizens for the Abatement of Aircraft Noise, Inc., et al.

499 US 917, 113 L Ed 2d 238, 111 S Ct 1303.

March 18, 1991. The motion of the Acting Solicitor General for divided argument is granted.

No. 90-984. Kansas Gas and Electric Company, Petitioner v Kansas State Corporation Commission, et al.

499 US 917, 113 L Ed 2d 238, 111 S Ct 1303.

March 18, 1991. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90-1189. Trojan Technologies, Inc., et al., Petitioners v Pennsylvania, et al.

499 US 917, 113 L Ed 2d 238, 111 S Ct 1303.

March 18, 1991. The Solicitor Gen-

eral is invited to file a brief in this case expressing the views of the United States.

No. 90-1194. Maine Public Utilities Commission, Petitioner v Maine Yankee Atomic Power Company

499 US 917, 113 L Ed 2d 239, 111 S Ct 1304.

March 18, 1991. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90-1074. Wayne Estelle, Warden, Petitioner v Mark Owen McGuire

499 US 917, 113 L Ed 2d 239, 111 S Ct 1304.

March 18, 1991. The motion for appointment of counsel is granted and it is ordered that Ann Hardgrove Voris, Esquire, of San Francisco, California, be appointed to serve as counsel for the respondent in this case.

No. 90-6352. Diane Griffin, Petitioner v United States

499 US 917, 113 L Ed 2d 239, 111 S Ct 1304, reh den (US) 117 L Ed 2d 484, 112 S Ct 1253.

March 18, 1991. The motion for appointment of counsel is granted and it is ordered that Michael G. Logan, Esquire, of Chicago, Illinois, be appointed to serve as counsel for the petitioner in this case.

No. 90-6986. Wenancjusz F. Kunek, Petitioner v Stanley K. Coffman, et al.

499 US 917, 113 L Ed 2d 239, 111 S Ct 1304.

March 18, 1991. The motion of petitioner for leave to proceed in forma pauperis is denied. Petitioner is allowed until April 8, 1991, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Justice Marshall and Justice Stevens, dissenting.

For the reasons expressed in Brown v Herald Co., Inc. 464 US 928, 78 L Ed 2d 301, 104 S Ct 331 (1983), we would deny the petition for a writ of certiorari without reaching the merits of the motion to proceed in forma pauperis.

No. 90-838. Shirley M. Molzof, Personal Representative of the Estate of Robert E. Molzof, Petitioner v United States

499 US 918, 113 L Ed 2d 239, 111 S Ct 1305.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Seventh Circuit granted.

Same case below, 911 F2d 18.

No. 90-970. Lechmere, Inc., Petitioner v National Labor Relations Board

499 US 918, 113 L Ed 2d 240, 111 S Ct 1305.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted.

Same case below, 914 F2d 313.

No. 90-1014. Robert E. Lee, Individually and as Principal of Nathan Bishop Middle School, et al., Petitioners v Daniel Weisman

499 US 918, 113 L Ed 2d 240, 111 S Ct 1305.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted.

Same case below, 908 F2d 1090.

No. 90-1102. Robert E. Gibson, Petitioner v Florida Bar, et al.

499 US 918, 113 L Ed 2d 240, 111 S Ct 1305.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit granted.

Same case below, 906 F2d 624.

No. 90-6297. Joseph Williams, Petitioner v United States

499 US 918, 113 L Ed 2d 240, 111 S Ct 1305.

March 18, 1991. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted.

Same case below, 910 F2d 1574.

No. 90-73. General American Life Insurance Company, Petitioner v Brad L. Simmons

499 US 918, 113 L Ed 2d 240, 111 S Ct 1305.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Alabama denied.

Same case below, 562 So 2d 140.

No. 90-244. Massachusetts Mutual Life Insurance Company, Petitioner v William E. Collins

499 US 918, 113 L Ed 2d 240, 111 S Ct 1306.

March 18, 1991. Petition for writ

of certiorari to the Supreme Court of Alabama denied.

Same case below, 575 So 2d 1005.

No. 90-728. Richard R. Syre, Petitioner v Pennsylvania

499 US 918, 113 L Ed 2d 241, 111 S Ct 1306.

March 18, 1991. Petition for writ of certiorari to the Superior Court of Pennsylvania, Philadelphia Office, denied.

Same case below, 400 Pa Super 625, 576 A2d 1139.

No. 90-756. Gary McKnight, Petitioner v General Motors Corporation

499 US 919, 113 L Ed 2d 241, 111 S Ct 1306.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 908 F2d 104.

No. 90-795. Angel Toro, aka Sammy Toro, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

499 US 919, 113 L Ed 2d 241, 111 S Ct 1306.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 914 F2d 268.

No. 90-808. Stanley Plesinski, Petitioner v United States

499 US 919, 113 L Ed 2d 241, 111 S Ct 1306.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 1033.

No. 90-811. John A. Stiles, Petitioner v Roy D. Blunt, Secretary of State of Missouri, et al.

499 US 919, 113 L Ed 2d 241, 111 S Ct 1307.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 912 F2d 260.

No. 90-818. Paul A. Richter, dba The Body Shop, Petitioner v San Diego, et al.

499 US 919, 113 L Ed 2d 241, 111 S Ct 1307.

March 18, 1991. Petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District, denied.

No. 90-841. Dennis L. Taxacher, Petitioner v United States

499 US 919, 113 L Ed 2d 242, 111 S Ct 1307.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 902 F2d 867.

No. 90-858. Louie V. Pittman, et al., Petitioners v Louis W. Sullivan, Secretary of Health and Human Services

499 US 919, 113 L Ed 2d 242, 111 S Ct 1307.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 911 F2d 42.

No. 90-863. Sabat Quinones Candelario, Petitioner v Anthony M. Frank, Postmaster General of the United States

499 US 919, 113 L Ed 2d 242, 111 S Ct 1307.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 906 F2d 798.

No. 90-877. William Dee, Robert Lentz, and Carl Gepp, Petitioners v United States

499 US 919, 113 L Ed 2d 242, 111 S Ct 1307.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 912 F2d 741.

No. 90-935. Cenvill Investors, Inc., fka Century Village East, Inc., et al., Petitioners v Condominium Owners Organization of Century Village East, et al.

499 US 919, 113 L Ed 2d 242, 111 S Ct 1308.

March 18, 1991. Petition for writ of certiorari to the District Court of Appeal of Florida, Fourth District, denied.

Same case below, 556 So 2d 1197.

No. 90-959. Patrick W. Simmons, et al., Petitioners v Interstate Commerce Commission, et al. (two cases)

499 US 919, 113 L Ed 2d 242, 111 S Ct 1308.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same cases below, 909 F2d 186 (first case) and 900 F2d 1023 (second case).

No. 90-964. Seaboard Lumber Company, et al., Petitioners v United States

499 US 919, 113 L Ed 2d 243, 111 S Ct 1308.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 903 F2d 1560.

No. 90-965. Alvy Thomas McQueen, Petitioner v Comptroller of Public Accounts of Texas, et al.

499 US 919, 113 L Ed 2d 243, 111 S Ct 1308.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 907 F2d 1544.

No. 90-971. Avesta AB, et al., Petitioners v United States, et al.

499 US 920, 113 L Ed 2d 243, 111 S Ct 1308.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 914 F2d 233.

No. 90-972. Bruce M. Jones, Dennis Ray Link, et ux., Petitioners v Edward J. Derwinski, Secretary of Veterans Affairs, et al.

499 US 920, 113 L Ed 2d 243, 111 S Ct 1309.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 1496.

No. 90-978. Melody Perkins, Petitioner v General Motors Corporation of America, et al.

499 US 920, 113 L Ed 2d 243, 111 S Ct 1309.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 911 F2d 22.

No. 90-983. Iron Workers Local 118, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, et al., Petitioners v National Labor Relations Board

499 US 920, 113 L Ed 2d 243, 111 S Ct 1309.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 908 F2d 977.

No. 90-987. Church of Scientology of California, Petitioner v United States, et al.

499 US 920, 113 L Ed 2d 244, 111 S Ct 1309.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 905 F2d 1344.

No. 90-1002. Richard G. Kaschak, Petitioner v Superior Court of California, Kern County

499 US 920, 113 L Ed 2d 244, 111 S Ct 1310, reh den (US) 114 L Ed 2d 131, 111 S Ct 2047.

March 18, 1991. Petition for writ of certiorari to the Court of Appeal of California, Fifth Appellate District, denied.

No. 90-1006. Donald Berger, et al., Petitioners v Edgewater Steel Company

499 US 920, 113 L Ed 2d 244, 111 S Ct 1310.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 911 F2d 911.

No. 90-1008. Connecticut Office of Consumer Counsel, et al., Petitioners v Federal Communications Commission, et al.

499 US 920, 113 L Ed 2d 244, 111 S Ct 1310.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 915 F2d 75.

No. 90-1012. Isabelle M. Woods, Petitioner v Anthony M. Frank, Postmaster General of the United States

499 US 920, 113 L Ed 2d 244, 111 S Ct 1310.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 911 F2d 728.

No. 90-1019. IMCO, Inc., et al., Petitioners v Curtis R. Morton, Commander, United States Defense Contracts, Administration Services Management Area-Birmingham, et al.

499 US 920, 113 L Ed 2d 244, 111 S Ct 1310.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 919 F2d 744.

No. 90-1020. County of Wayne, Michigan, Petitioner v Linda Hartley Rushing

499 US 920, 113 L Ed 2d 245, 111 S Ct 1310.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Michigan denied.

Same case below, 436 Mich 247, 462 NW2d 23.

No. 90-1043. W. F. Development Corporation, et al., Petitioners v Office of the United States Trustee

499 US 921, 113 L Ed 2d 245, 111 S Ct 1311.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 905 F2d 883.

No. 90-1083. Village of Wilmette, et al., Petitioners v National Peoples Action

499 US 921, 113 L Ed 2d 245, 111 S Ct 1311.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 914 F2d 1008.

No. 90-1088. Eva O. Rettig, Petitioner v Kent City School District, et al.

No. 90-6388. Thomas M. Rettig, Petitioner v Kent City School District, et al.

499 US 921, 113 L Ed 2d 245, 111 S Ct 1311, reh den (US) 114 L Ed 2d 131, 111 S Ct 2047.

March 18, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same cases below, 912 F2d 466.

No. 90-1097. Bernard J. Dolenz, Petitioner v Stuart Yacht Builders, Inc.

499 US 921, 113 L Ed 2d 245, 111 S Ct 1311, reh den (US) 114 L Ed 2d 91, 111 S Ct 1697.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 914 F2d 268.

No. 90-1112. Total Condo Concepts, Inc., et al., Petitioners v County of San Diego, et al.

499 US 921, 113 L Ed 2d 245, 111 S Ct 1312.

March 18, 1991. Petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District, denied.

No. 90-1119. Roland A. LeBlanc, Petitioner v United States

499 US 921, 113 L Ed 2d 246, 111 S Ct 1312, reh den (US) 115 L Ed 2d 1101, 112 S Ct 17

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 913 F2d 17.

No. 90-1120. Leon Garmon, Petitioner v Alabama State Bar

499 US 921, 113 L Ed 2d 246, 111 S Ct 1312.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Alabama denied.

Same case below, 570 So 2d 633.

No. 90-1131. Railway Labor Executives' Association, et al., Petitioners v Chesapeake Western Railway, et al.

499 US 921, 113 L Ed 2d 246, 111 S Ct 1312.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 915 F2d 116.

No. 90-1148. Roy Rodgers, Sheriff, Gilchrist County, Florida, Petitioner v Marcia J. Hufford, et al.

499 US 921, 113 L Ed 2d 246, 111 S Ct 1312.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 912 F2d 1338.

No. 90-1149. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Petitioner v Mack Trucks, Inc.

499 US 921, 113 L Ed 2d 246, 111 S Ct 1313.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 917 F2d 107.

No. 90-1154. Louis James Scott, Petitioner v United States

499 US 921, 113 L Ed 2d 246, 111 S Ct 1313.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 910 F2d 1289.

No. 90-1158. Serv-A-Portion, Inc., et al., Petitioners v J. F. Feeser Inc., et al.

499 US 921, 113 L Ed 2d 246, 111 S Ct 1313.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 909 F2d 1524.

No. 90-1159. Raymond J. Bly, et ux., Petitioners v Richard Kinlein

499 US 922, 113 L Ed 2d 247, 111 S Ct 1313.

March 18, 1991. Petition for writ of certiorari to the Court of Special Appeals of Maryland denied.

Same case below, 83 Md App 704.

No. 90-1160. Norman R. Evonuk, Petitioner v Oregon

499 US 922, 113 L Ed 2d 247, 111 S Ct 1313.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-1162. Silas V. Cross, et al., Petitioners v Washington, et al.

499 US 922, 113 L Ed 2d 247, 111 S Ct 1313.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 911 F2d 341.

No. 90-1163. Raul Palomo, Petitioner v Texas

499 US 922, 113 L Ed 2d 247, 111 S Ct 1314.

March 18, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, First District, denied.

No. 90-1166. Long Island Typographical Union No. 915, CWA, AFL-CIO, Petitioner v Newsday, Inc.

499 US 922, 113 L Ed 2d 247, 111 S Ct 1314.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 915 F2d 840.

No. 90-1177. City of New Orleans, et al., Petitioners v Rolando Duboue

499 US 922, 113 L Ed 2d 247, 111 S Ct 1314.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 909 F2d 129.

No. 90-1181. James Campbell and Lois Campbell, Co-Administrators of Estate of Ronald J. Campbell, Deceased, Petitioners v Colin F. White

499 US 922, 113 L Ed 2d 248, 111 S Ct 1314.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 916 F2d 421.

No. 90-1182. Warren E. Saint Thomas, Petitioner v Merit Systems Protection Board

499 US 922, 113 L Ed 2d 248, 111 S Ct 1314.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 914 F2d 271.

No. 90-1185. Connecticut, Petitioner v Susan Nelson

499 US 922, 113 L Ed 2d 248, 111 S Ct 1315.

March 18, 1991. Petition for writ of certiorari to the Appellate Court of Connecticut denied.

Same case below, 23 Conn App 215, 579 A2d 1104.

No. 90-1186. Johnson Gas Appliance Company, Petitioner v VE Holding Corporation

499 US 922, 113 L Ed 2d 248, 111 S Ct 1315.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 917 F2d 1574.

No. 90-1188. Joseph M. Teeter, Petitioner v Steve Shambaugh, Acting Director of Support Services, Fairview Training Center, Department of Human Resources of Oregon

499 US 922, 113 L Ed 2d 248, 111 S Ct 1315.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 28.

No. 90-1193. Paul Dee Human, Superintendent of Gravette Public School District, et al., Petitioners v John Doe, et al.

499 US 922, 113 L Ed 2d 248, 111 S Ct 1315.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 923 F2d 857.

No. 90-1198. Anthony J. Bator, Petitioner v Washoe County Building Department, et al.

499 US 922, 113 L Ed 2d 249, 111 S Ct 1315, reh den (US) 114 L Ed 2d 91, 111 S Ct 1697.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Nevada denied.

Same case below, 106 Nev 1015, 835 P2d 27.

No. 90-1199. Mark E. Lumpkin, Petitioner v Beverly Travis Lumpkin

499 US 923, 113 L Ed 2d 249, 111 S Ct 1315.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 918 F2d 175.

No. 90-1200. United States Fire Insurance Company, Petitioner v Riverside Ventures, Inc., et al.

499 US 923, 113 L Ed 2d 249, 111 S Ct 1316.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 915 F2d 692.

No. 90-1203. Gene P. Murray, Petitioner v Ohio Adult Parole Authority, et al.

499 US 923, 113 L Ed 2d 249, 111 S Ct 1316.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 916 F2d 713.

No. 90-1204. Eugene P. Eccli, Petitioner v Will Von Klemperer, et al.

499 US 923, 113 L Ed 2d 249, 111 S Ct 1316.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 915 F2d 1560.

No. 90-1206. Elda Villarreal, Petitioner v Harte-Hanks Communications, Inc., et al.

499 US 923, 113 L Ed 2d 249, 111 S Ct 1316.

March 18, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, Thirteenth District, denied.

Same case below, 787 SW2d 131.

No. 90-1207. Cecil Ray Taylor, Petitioner v Commissioner of Internal Revenue

499 US 923, 113 L Ed 2d 249, 111 S Ct 1316.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 1579.

No. 90-1209. Joyce Balzer, Petitioner v Donald Meier, James Book, K-B Farms, Inc., and Robert H. Friel

499 US 923, 113 L Ed 2d 250, 111 S Ct 1316.

March 18, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Second District, denied.

Same case below, 196 Ill App 3d 1104, 582 NE2d 773.

No. 90-1210. Chester Upland School District, Petitioner v Lester H., a Minor and Octavia P., his Mother and Next Friend

499 US 923, 113 L Ed 2d 250, 111 S Ct 1317.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 916 F2d 865.

No. 90-1239. United Association of Black Landscapers, et al., Petitioners v City of Milwaukee, et al.

499 US 923, 113 L Ed 2d 250, 111 S Ct 1317.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 916 F2d 1261.

No. 90-1292. Daniel Dwayne Lewis, Petitioner v United States

499 US 923, 113 L Ed 2d 250, 111 S Ct 1317.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 915 F2d 1574.

No. 90-1313. Albert A. Robin, Sheli Z. Rosenberg, Donald S. Chisholm, and Equity Holdings, Petitioners v Arthur Young & Company

499 US 923, 113 L Ed 2d 250, 111 S Ct 1317.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 915 F2d 1120.

No. 90-6059. Loras Steines, Petitioner v Administrator of Veterans Affairs

499 US 923, 113 L Ed 2d 250, 111 S Ct 1317, reh den (US) 114 L Ed 2d 131, 111 S Ct 2047.

March 18, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Third District, denied.

Same case below, 192 Ill App 3d 1109, 577 NE2d 203.

No. 90-6137. Benito Mora, Petitioner v United States

499 US 923, 113 L Ed 2d 251, 111 S Ct 1317.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 911 F2d 728.

No. 90-6218. Michael Dean Freeman, Petitioner v United States

499 US 924, 113 L Ed 2d 251, 111 S Ct 1318.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 909 F2d 1109.

No. 90-6309. Jorge Enrique Arango, Petitioner v United States

499 US 924, 113 L Ed 2d 251, 111 S Ct 1318.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 912 F2d 441.

No. 90-6317. Eugene Griffin, Petitioner v United States

499 US 924, 113 L Ed 2d 251, 111 S Ct 1318.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 914 F2d 269.

No. 90-6356. Luis Antonio Mejia, Petitioner v United States

499 US 924, 113 L Ed 2d 251, 111 S Ct 1318.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 470.

No. 90-6367. Walter Turner, Petitioner v United States

499 US 924, 113 L Ed 2d 251, 111 S Ct 1318.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 908 F2d 974.

No. 90-6402. Calvin Raymond Rogers, Petitioner v United States

499 US 924, 113 L Ed 2d 252, 111 S Ct 1318.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 165.

No. 90-6451. John Anthony Harris, Petitioner v Kentucky

499 US 924, 113 L Ed 2d 252, 111 S Ct 1319.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Kentucky denied.

Same case below, 793 SW2d 802.

No. 90-6517. Sam Paiz and Tim Rector, Petitioners v United States

499 US 924, 113 L Ed 2d 252, 111 S Ct 1319, reh den (US) 114 L Ed 2d 729, 111 S Ct 2278.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 905 F2d 1014.

No. 90-6537. Tommie Lee James, Petitioner v Michigan

499 US 924, 113 L Ed 2d 252, 111 S Ct 1319.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Michigan denied.

Same case below, 436 Mich 851, 460 NW2d 557.

No. 90-6542. Carolyn G. Simmons, Petitioner v James Billington

499 US 924, 113 L Ed 2d 252, 111 S Ct 1319.

March 18, 1991. Petition for writ of certiorari to the District of Columbia Court of Appeals denied.

No. 90-6556. Kourosh Bakhtiari, Petitioner v United States

499 US 924, 113 L Ed 2d 252, 111 S Ct 1319.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 913 F2d 1053.

No. 90-6620. Roy A. Day, Petitioner v GAF Corporation, et al.

499 US 924, 113 L Ed 2d 252, 111 S Ct 1319, reh den 499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 918 F2d 182.

No. 90-6624. Vernon Stratton, Petitioner v United States

499 US 924, 113 L Ed 2d 253, 111 S Ct 1320.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 1578.

No. 90-6652. Steve Randolph Gelis, Petitioner v United States

499 US 924, 113 L Ed 2d 253, 111 S Ct 1320.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 1492.

No. 90-6661. Thomas Robinson, Petitioner v United States

499 US 924, 113 L Ed 2d 253, 111 S Ct 1320.

March 18, 1991. Petition for writ of certiorari to the District of Columbia Court of Appeals denied.

No. 90-6672. Bruno Mancari, Petitioner v United States

499 US 924, 113 L Ed 2d 253, 111 S Ct 1320.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 914 F2d 1014.

No. 90-6757. Josefina Melendez Liranzo, Petitioner v United States

499 US 925, 113 L Ed 2d 253, 111 S Ct 1320.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 842.

No. 90-6772. John E. Rose, Petitioner v United States

499 US 925, 113 L Ed 2d 253, 111 S Ct 1321.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 25.

No. 90-6775. Jesus Pulido-Gomez, Petitioner v United States

499 US 925, 113 L Ed 2d 253, 111 S Ct 1321.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 917 F2d 494.

No. 90-6786. Daniel Sparkman, Petitioner v Gregory Coler

499 US 925, 113 L Ed 2d 254, 111 S Ct 1321.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-6789. David Ruiz, Petitioner v Ronnie Earle, et al.

499 US 925, 113 L Ed 2d 254, 111 S Ct 1321.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 914 F2d 253.

No. 90-6791. Elmer Leon Peterson, Petitioner v Edward Grannis, et al.

499 US 925, 113 L Ed 2d 254, 111 S Ct 1321, reh den 499 US 984, 113 L ED 2d 738, 11 S Ct 1643.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 911 F2d 724.

No. 90-6792. Edward A. Ganey, Jr., Petitioner v Travis Outlaw, et al.

499 US 925, 113 L Ed 2d 254, 111 S Ct 1321.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 22.

No. 90-6793. Will Barnes, Petitioner v Richard I. Norris, et al.

499 US 925, 113 L Ed 2d 254, 111 S Ct 1322.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-6802. Terry Savage-El, Petitioner v R. H. Rison, Warden

499 US 925, 113 L Ed 2d 254, 111 S Ct 1322.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 908 F2d 977.

No. 90-6807. Emmanuel Mitchell, Petitioner v Otie Jones, et al.

499 US 925, 113 L Ed 2d 254, 111 S Ct 1322, reh den (US) 114 L Ed 2d 473, 111 S Ct 2068.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 909 F2d 1483.

No. 90-6812. Ralph M. Lepiscopo, Petitioner v Susan M. Conway

499 US 925, 113 L Ed 2d 255, 111 S Ct 1322.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of New Mexico denied.

No. 90-6815. Ronald Lee Morrison, Petitioner v Clayton Oxendine, et al.

499 US 925, 113 L Ed 2d 255, 111 S Ct 1322, reh den (US) 114 L Ed 2d 92, 111 S Ct 1698.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1302.

No. 90-6817. Rosauro Quintero, Petitioner v Torvald Klaveness & Company, A/S, et al.

499 US 925, 113 L Ed 2d 255, 111 S Ct 1322.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 914 F2d 717.

No. 90-6821. Winston Willis, Petitioner v City of Cleveland, Ohio, et al.

499 US 925, 113 L Ed 2d 255, 111 S Ct 1323.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 916 F2d 714.

No. 90-6822. Raymond Barnes, Petitioner v Robert Henderson, Warden

499 US 925, 113 L Ed 2d 255, 111 S Ct 1323.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 843.

No. 90-6824. Edward J. Brennan, Jr., Petitioner v Ohio et al.

499 US 926, 113 L Ed 2d 255, 111 S Ct 1323, reh den (US) 114 L Ed 2d 132, 111 S Ct 2048.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 916 F2d 712.

No. 90-6832. Arthur D'Amario, III, Petitioner v West Publishing Company and Thomas F. Fay, Chief Justice of Rhode Island Supreme Court

499 US 926, 113 L Ed 2d 256, 111 S Ct 1323.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

No. 90-6837. Frank Wayne Pehringer, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

499 US 926, 113 L Ed 2d 256, 111 S Ct 1323.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 918 F2d 182.

No. 90-6838. Melvin Tyler and Mary Lea Tyler, Petitioners v Missouri Department of Corrections, et al.

499 US 926, 113 L Ed 2d 256, 111 S Ct 1324.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

No. 90-6840. Paul M. Humphrey, Petitioner v Southern Ohio Correctional Facility

499 US 926, 113 L Ed 2d 256, 111 S Ct 1324.

March 18, 1991. Petition for writ of certiorari to the Court of Claims of Ohio denied.

No. 90-6842. Allan Max Richards, Petitioner v Committee of Bar Examiners

499 US 926, 113 L Ed 2d 256, 111 S Ct 1324.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-6844. Billy Truman Wingo, Petitioner v Virginia

499 US 926, 113 L Ed 2d 256, 111 S Ct 1324.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Virginia denied.

No. 90-6847. Kathleen Marie Ehrsam, Petitioner v Alan M. Rubenstein, et al.

499 US 926, 113 L Ed 2d 257, 111 S Ct 1324.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 917 F2d 764.

No. 90-6848. Roy A. Day, Petitioner v Rosemary Barkett, Justice, Florida Supreme Court, et al.

499 US 926, 113 L Ed 2d 257, 111 S Ct 1324, reh den 499 US 984, 113 L Ed 2d 738, 111 S Ct 1644.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-6857. Tom Parker, Petitioner v Willie E. Johnson, Warden, et al.

499 US 926, 113 L Ed 2d 257, 111 S Ct 1325.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 919 F2d 744.

No. 90-6860. Jorge Mario Herrera, Petitioner v Oklahoma

499 US 926, 113 L Ed 2d 257, 111 S Ct 1325.

March 18, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

No. 90-6863. Solomon Mustopher, Petitioner v Richard Dugger, Secretary, Florida Department of Corrections, et al.

499 US 926, 113 L Ed 2d 257, 111 S Ct 1325.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 918 F2d 182.

No. 90-6865. Emmanuel Mitchell, Petitioner v Hugh W. Stanton, Jr.

499 US 926, 113 L Ed 2d 257, 111 S Ct 1325.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Tennessee, Western Division, denied.

No. 90-6867. Sophie Resetar, Petitioner v John C. Eisley, et al.

499 US 926, 113 L Ed 2d 257, 111 S Ct 1325.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of

Pennsylvania, Western District, denied.

Same case below, 524 Pa 598, 568 A2d 1248.

No. 90-6868. Caroline T. Corbit, Petitioner v Evelyn Drake, et al.

499 US 926, 113 L Ed 2d 258, 111 S Ct 1325.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 919 F2d 743.

No. 90-6875. Hugh Cockrum, Petitioner v David Mills, Warden

499 US 927, 113 L Ed 2d 258, 111 S Ct 1326.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-6877. Torrence Tillman, Petitioner v Jack Duckworth, et al.

499 US 927, 113 L Ed 2d 258, 111 S Ct 1326, reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 920 F2d 935.

No. 90-6880. Charlotte Prestwood, Petitioner v United States

499 US 927, 113 L Ed 2d 258, 111 S Ct 1326.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 901 F2d 1112.

No. 90-6882. Hilton Lawrence Brown, Petitioner v Administrative Law Judge

499 US 927, 113 L Ed 2d 258, 111 S Ct 1326.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 247.

No. 90-6883. Jack Frost, Petitioner v Bruce Geernaert, et al.

499 US 927, 113 L Ed 2d 258, 111 S Ct 1326.

March 18, 1991. Petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, denied.

Same case below, 200 Cal App 3d 1104, 246 Cal Rptr 440.

No. 90-6893. Franklin L. Hanson, Petitioner v Department of the Army

499 US 927, 113 L Ed 2d 258, 111 S Ct 1326.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 918 F2d 185.

No. 90-6900. Twyla Thompson, Petitioner v Pennsylvania

499 US 927, 113 L Ed 2d 259, 111 S Ct 1327.

March 18, 1991. Petition for writ of certiorari to the Superior Court of Pennsylvania, Philadelphia Office, denied.

Same case below, 394 Pa Super 634, 569 A2d 1386.

No. 90-6902. Robert Smith, Petitioner v United States

499 US 927, 113 L Ed 2d 259, 111 S Ct 1327.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 907 F2d 155.

No. 90-6904. Willie James Jeffries, Petitioner v Crispus C. Nix, Warden

499 US 927, 113 L Ed 2d 259, 111 S Ct 1327, reh den (US) 114 L Ed 2d 132, 111 S Ct 2048.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 912 F2d 982.

No. 90-6912. Margaret Mandolph-Greene, Petitioner v Gus Sainas

499 US 927, 113 L Ed 2d 259, 111 S Ct 1327.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Hawaii denied.

Same case below, 71 Haw 653, 798 P2d 446.

No. 90-6914. James L. Martin, Petitioner v Pennsylvania Real Estate Commission, et al.

499 US 927, 113 L Ed 2d 259, 111 S Ct 1327, reh den (US) 114 L Ed 2d 92, 111 S Ct 1698.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-6918. Carl Butler and Ama Butler, Petitioners v Greenpoint Savings Bank, et al.

499 US 927, 113 L Ed 2d 259, 111 S Ct 1327.

March 18, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 842.

No. 90-6919. Verna Mae Stafford, Petitioner v Oklahoma

499 US 927, 113 L Ed 2d 260, 111 S Ct 1328.

March 18, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

Same case below, 800 P2d 738.

No. 90-6922. James D. Carter, Petitioner v Mead Paper, et al.

499 US 927, 113 L Ed 2d 260, 111 S Ct 1328.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 24.

No. 90-6925. Richard P. Bosa, Petitioner v Colleen Pickford Bosa

499 US 927, 113 L Ed 2d 260, 111 S Ct 1328, reh den (US) 114 L Ed 2d 132, 111 S Ct 2048.

March 18, 1991. Petition for writ of certiorari to the Superior Court of Pennsylvania, Philadelphia Office, denied.

Same case below, 398 Pa Super 641, 573 A2d 617.

No. 90-6927. Duane Elam, Petitioner v Dale Foltz, Warden

499 US 928, 113 L Ed 2d 260, 111 S Ct 1328.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 738.

No. 90-6930. Robert Graham, Petitioner v John P. Whitley, Warden

499 US 928, 113 L Ed 2d 260, 111 S Ct 1328.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 90-6931. Pablo Rael, Petitioner v George Sullivan, Warden

499 US 928, 113 L Ed 2d 260, 111 S Ct 1328.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 918 F2d 874.

No. 90-6933. Paul C. Mathis, Petitioner v Wayne County Friend of the Court, et al.

499 US 928, 113 L Ed 2d 261, 111 S Ct 1329, reh den (US) 115 L Ed 2d 1011, 111 S Ct 2843.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-6934. Kelvin X. Morris, Petitioner v Dr. Puleo, et al.

499 US 928, 113 L Ed 2d 261, 111 S Ct 1329.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 731.

No. 90-6935. Walter J. Moore, Petitioner v Herb Maschner, et al.

499 US 928, 113 L Ed 2d 261, 111 S Ct 1329, reh den (US) 114 L Ed 2d 92, 111 S Ct 1699.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-6936. Wadress Hubert Metoyer, Jr., Petitioner v Stephen W. Kaiser, Warden, et al.

499 US 928, 113 L Ed 2d 261, 111 S Ct 1329, reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-6938. Horace Griffin, Petitioner v Michael P. Lane, et al.

499 US 928, 113 L Ed 2d 261, 111 S Ct 1329.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 909 F2d 1486.

No. 90-6942. Robert Aaron Wiley, Petitioner v United States

499 US 928, 113 L Ed 2d 261, 111 S Ct 1330.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 564.

No. 90-6944. Gerald Davis Fuller, Petitioner v Warden, Maryland Penitentiary

499 US 928, 113 L Ed 2d 261, 111 S Ct 1330, reh den 499 US 971, 113 L Ed 2d 674, 111 S Ct 1613.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 1491.

No. 90-6950. James Edmond Watts, Petitioner v James E. Johnson, Warden, et al.

499 US 928, 113 L Ed 2d 262, 111 S Ct 1330, reh den (US) 114 L Ed 2d 132, 111 S Ct 2048.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 1493.

No. 90-6952. Robert Curtis Varner, Petitioner v Jim Morrison, Warden, et al.

499 US 928, 113 L Ed 2d 262, 111 S Ct 1330.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-6961. John Rodgers Burnley, Petitioner v Henry A. Kennon

499 US 928, 113 L Ed 2d 262, 111 S Ct 1330.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 923 F2d 848.

No. 90-6962. Parviz Karim-Panahi, Petitioner v Ronald Reagan, et al.

499 US 928, 113 L Ed 2d 262, 111 S Ct 1330, reh den (US) 114 L Ed 2d 92, 111 S Ct 1699.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 469.

No. 90-6965. Richard J. McDonald, Petitioner v United States

499 US 928, 113 L Ed 2d 262, 111 S Ct 1331.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 146.

No. 90-6970. Jeffery Sanders, Petitioner v Perry M. Johnson, et al.

499 US 928, 113 L Ed 2d 262, 111 S Ct 1331.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 141.

No. 90-6973. Patrick Scanlan, Petitioner v San Francisco County Department of Social Services

499 US 929, 113 L Ed 2d 263, 111 S Ct 1331.

March 18, 1991. Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

No. 90-6977. Willie L. Glover, Jr., Petitioner v John O. Marsh, Secretary of the Army

499 US 929, 113 L Ed 2d 263, 111 S Ct 1331.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 557.

No. 90-6982. Woodrow Williams, et ux., Petitioners v Bernard Kanstoroom, et al.

499 US 929, 113 L Ed 2d 263, 111 S Ct 1331, reh den (US) 114 L Ed 2d 92, 111 S Ct 1699.

March 18, 1991. Petition for writ of certiorari to the Court of Special Appeals of Maryland denied.

Same case below, 82 Md App 774.

No. 90-6995. Gerald Donald Cross and Dwane Heaton, Jr., Petitioners v United States

499 US 929, 113 L Ed 2d 263, 111 S Ct 1331.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 916 F2d 622.

No. 90-7003. John Peters, Petitioner v Ohio

499 US 929, 113 L Ed 2d 263, 111 S Ct 1332.

March 18, 1991. Petition for writ of certiorari to the Court of Appeals of Ohio, Cuyahoga County, denied.

No. 90-7004. Stephen Pierce, Petitioner v United States

499 US 929, 113 L Ed 2d 263, 111 S Ct 1332.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 920 F2d 934.

No. 90-7007. Raymond Wagstaff-El, Petitioner v Carlton Press Company, et al.

499 US 929, 113 L Ed 2d 263, 111 S Ct 1332.

March 18, 1991. Petition for writ of certiorari to the United States

Court of Appeals for the Second Circuit denied.

Same case below, 913 F2d 56.

No. 90-7021. Wilford Brown, Jr., Petitioner v United States

499 US 929, 113 L Ed 2d 264, 111 S Ct 1332.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 918 F2d 174.

No. 90-7028. Brian Robert Keith, Petitioner v United States

499 US 929, 113 L Ed 2d 264, 111 S Ct 1332.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1302.

No. 90-7029. Gwendolyn Joseph, Petitioner v United States

499 US 929, 113 L Ed 2d 264, 111 S Ct 1332.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 921 F2d 282.

No. 90-7035. Jose Antonio Reyes, Petitioner v United States

499 US 929, 113 L Ed 2d 264, 111 S Ct 1333.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 844.

No. 90-7037. Fidel J. Campos, Petitioner v United States

499 US 929, 113 L Ed 2d 264, 111 S Ct 1333.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 920 F2d 929.

No. 90-7041. Theodore Travers, Petitioner v United States

499 US 929, 113 L Ed 2d 264, 111 S Ct 1333.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 287 US App DC 19, 918 F2d 225.

No. 90-7047. Bobby Eugene Stewart, Petitioner v United States

499 US 929, 113 L Ed 2d 265, 111 S Ct 1333.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 922 F2d 839.

No. 90-7052. Marjorie J. Jacobs, Petitioner v United States

499 US 930, 113 L Ed 2d 265, 111 S Ct 1333.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 10.

No. 90-7053. Jeff Edward Fortenberry, Jr., Petitioner v United States

499 US 930, 113 L Ed 2d 265, 111 S Ct 1333.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 914 F2d 671.

No. 90-7057. Benjamin Wheeler, Petitioner v United States

499 US 930, 113 L Ed 2d 265, 111 S Ct 1334.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 918 F2d 956.

No. 90-7059. Charles E. Lindsay, Petitioner v United States

499 US 930, 113 L Ed 2d 265, 111 S Ct 1334.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 922 F2d 839.

No. 90-7060. Allen R. Harris, Jr., Petitioner v United States

499 US 930, 113 L Ed 2d 265, 111 S Ct 1334.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1302.

No. 90-7061. Alfredo Martinez-Cabre, Petitioner v United States

499 US 930, 113 L Ed 2d 265, 111 S Ct 1334.

March 18, 1991. Petition for writ of certiorari to the United States

Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1302.

No. 90-7066. Willis Dean, Petitioner v United States

499 US 930, 113 L Ed 2d 266, 111 S Ct 1334.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 920 F2d 12.

No. 90-7071. Pedro Reynaldo Anderson, Petitioner v United States

499 US 930, 113 L Ed 2d 266, 111 S Ct 1334.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 923 F2d 860.

No. 90-7072. Harry Thompson, Petitioner v United States

499 US 930, 113 L Ed 2d 266, 111 S Ct 1335.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 563.

No. 90-7078. Ralph Anthony Upshaw, Petitioner v United States

499 US 930, 113 L Ed 2d 266, 111 S Ct 1335.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 918 F2d 789.

No. 90-7086. Dorman Dean Coleman, Petitioner v United States

499 US 930, 113 L Ed 2d 266, 111 S Ct 1335.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 918 F2d 181.

No. 90-7089. Yolanda Ramos Carrasco, Petitioner v United States

499 US 930, 113 L Ed 2d 266, 111 S Ct 1335.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 918 F2d 175.

No. 90-7092. Wale Corpus-Barajas, Petitioner v United States

499 US 930, 113 L Ed 2d 267, 111 S Ct 1335.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 919 F2d 736.

No. 90-7098. Pedro Pablo, Petitioner v United States

499 US 930, 113 L Ed 2d 267, 111 S Ct 1335.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 844.

No. 90-7102. George A. Martin, Petitioner v United States

499 US 930, 113 L Ed 2d 267, 111 S Ct 1336.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 286 US App DC 383, 917 F2d 1313.

No. 90-7114. Emilio Caro, Petitioner v United States

499 US 931, 113 L Ed 2d 267, 111 S Ct 1336.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 843.

No. 90-7122. James Bryan Cozad, Petitioner v United States

499 US 931, 113 L Ed 2d 267, 111 S Ct 1336.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 918 F2d 181.

No. 90-7125. Maria Elene Gonzalez, Petitioner v United States

499 US 931, 113 L Ed 2d 267, 111 S Ct 1336.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 146.

No. 90-7147. Eddie Ray Hampton, aka Edward Ray Hampton, Petitioner v Nevada

499 US 931, 113 L Ed 2d 268, 111 S Ct 1336.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Nevada denied.

Same case below, 106 Nev 1024, 835 P2d 41.

No. 90-1142. New Jersey, Petitioner v Nathaniel Harvey

499 US 931, 113 L Ed 2d 268, 111 S Ct 1336.

March 18, 1991. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the Supreme Court of New Jersey denied.

Same case below, 121 NJ 407, 581 A2d 483.

No. 90-1231. Paul Caspari, Superintendent, Missouri Eastern Correctional Center, et al., Petitioners v David E. Walton

499 US 931, 113 L Ed 2d 268, 111 S Ct 1337.

March 18, 1991. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 916 F2d 1352.

No. 90-1168. Town of Concord, Massachusetts and Town of Wellesley, Massachusetts, Petitioners v Boston Edison Company

499 US 931, 113 L Ed 2d 268, 111 S Ct 1337, reh den (US) 114 L Ed 2d 131, 111 S Ct 2047.

March 18, 1991. The motion of American Public Power Association, et al. for leave to file a brief as amici curiae is granted. The motion of National Association of Gas Consumers for leave to file a brief as amicus curiae is granted. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied. Justice White would grant certiorari.

Same case below, 915 F2d 17.

No. 90-1191. Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, et al., Petitioners v Weiss Bros. Construction Co., dba Weisscal, et al.

499 US 931, 113 L Ed 2d 268, 111 S Ct 1337.

March 18, 1991. The motion of Carpenters Joint Apprenticeship and Training Committee Fund for Southern California for leave to file a brief as amicus curiae is granted. The motion of Electrical Joint Apprenticeship, et al. for leave to file a brief as amici curiae is granted. Petition for writ of certiorari to the Court of Appeal of California, Third Appellate District, denied.

Same case below, 221 Cal App 3d 867, 270 Cal Rptr 786.

No. 90-6086. Clifton Eugene Belyeu, Petitioner v Texas

499 US 931, 113 L Ed 2d 269, 111 S Ct 1337.

March 18, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 791 SW2d 66.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6101. John J. Joubert, Petitioner v Nebraska

499 US 931, 113 L Ed 2d 269, 111 S Ct 1338.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Nebraska denied.

Same case below, 235 Neb 230, 455 NW2d 117.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6291. Michael Ray Orndorff, James William Holmes, Hoyt Franklin Clines and Darryl V. Richley, Petitioners v A. L. Lockhart, Director, Arkansas Department of Corrections

499 US 931, 113 L Ed 2d 269, 111 S Ct 1338.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 906 F2d 1230.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6325. Josoph Henry, Petitioner v Pennsylvania

499 US 931, 113 L Ed 2d 269, 111 S Ct 1338.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied.

Same case below, 524 Pa 135, 569 A2d 929.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances

cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6541. Harold Bean, Petitioner v Illinois

499 US 932, 113 L Ed 2d 270, 111 S Ct 1338.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 137 Ill 2d 65, 560 NE2d 258.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6816. William Van Poyck, Petitioner v Florida

499 US 932, 113 L Ed 2d 270, 111 S Ct 1339.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Florida denied.

Same case below, 564 So 2d 1066.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6818. Glennon Paul Sweet, Petitioner v Missouri

499 US 932, 113 L Ed 2d 270, 111 S Ct 1339.

March 18, 1991. Petition for writ of certiorari to the Supreme Court of Missouri denied.

Same case below, 796 SW2d 607.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6850. Oscar Gates, Petitioner v Warden at San Quentin

499 US 932, 113 L Ed 2d 270, 111 S Ct 1339.

March 18, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6855. David Wayne Spence, Petitioner v Texas

499 US 932, 113 L Ed 2d 271, 111 S Ct 1339.

March 18, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 795 SW2d 743.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6891. In Re Sean W. Mason, Petitioner

499 US 918, 113 L Ed 2d 271, 111 S Ct 1340, reh den 499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

March 18, 1991. The petition for writ of common-law certiorari is denied.

No. 90-6924. In Re Richard P. Bosa, Petitioner

499 US 918, 113 L Ed 2d 271, 111 S Ct 1340.

March 18, 1991. The petition for writ of mandamus is denied.

No. 90-6920. In Re Dwayne L. Gillispie, Petitioner

499 US 918, 113 L Ed 2d 271, 111 S Ct 1340.

March 18, 1991. The petition for writ of prohibition is denied.

No. 89-5961. Robert Lacy Parker, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

499 US 932, 113 L Ed 2d 271, 111 S Ct 1340.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 308, 112 L Ed 2d 812, 111 S Ct 731.

No. 90-752. Roger F. Winchester, Petitioner v County of San Diego, et al.

499 US 932, 113 L Ed 2d 271, 111 S Ct 1340.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1047, 112 L Ed 2d 773, 111 S Ct 753.

No. 90-839. County of Kern, California, Petitioner v Dan Abshire, et al.

499 US 932, 113 L Ed 2d 272, 111 S Ct 1341.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1068, 112 L Ed 2d 848, 111 S Ct 785.

No. 90-1013. Stephen C. Stem, Petitioner v Ralph Ahearn and Chris Card

499 US 932, 113 L Ed 2d 272, 111 S Ct 1341.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1069, 112 L Ed 2d 850, 111 S Ct 788.

No. 90-5851. Louis Joe Truesdale, Petitioner v South Carolina

499 US 932, 113 L Ed 2d 272, 111 S Ct 1341.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1074, 112 L Ed 2d 861, 111 S Ct 800.

No. 90-6050. Alonzo Payne, Petitioner v John Middleton, et al.

499 US 932, 113 L Ed 2d 272, 111 S Ct 1341.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1070, 112 L Ed 2d 853, 111 S Ct 791.

No. 90-6289. Paris Armstrong, Jr., Petitioner v Anthony Frank, Postmaster General

499 US 932, 113 L Ed 2d 272, 111 S Ct 1341.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1071, 112 L Ed 2d 855, 111 S Ct 793.

No. 90-6302. Carl Sandlin, Petitioner v Charles Ellis

499 US 932, 113 L Ed 2d 272, 111 S Ct 1341.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1071, 112 L Ed 2d 855, 111 S Ct 793.

No. 90-6323. Carlos Diaz, Petitioner v Ronald Miles, Superintendent, Elmira Correctional Facility, et al.

499 US 932, 113 L Ed 2d 272, 111 S Ct 1342.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1071, 112 L Ed 2d 856, 111 S Ct 794.

No. 90-6326. Donald Gene Henthorn, Petitioner v United States District Court for the District of Columbia

499 US 932, 113 L Ed 2d 273, 111 S Ct 1342.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1071, 112 L Ed 2d 856, 111 S Ct 794.

No. 90-6336. Scott W. Veale and David T. Veale, Petitioners v New Hampshire

499 US 932, 113 L Ed 2d 273, 111 S Ct 1342.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1071, 112 L Ed 2d 856, 111 S Ct 794.

No. 90-6354. In Re John E. Mulville, Petitioner

499 US 932, 113 L Ed 2d 273, 111 S Ct 1342.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1066, 112 L Ed 2d 862, 111 S Ct 801.

No. 90-6355. In Re John E. Mulville, Petitioner

499 US 932, 113 L Ed 2d 273, 111 S Ct 1342.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1066, 112 L Ed 2d 862, 111 S Ct 801.

No. 90-6357. Carl R. Sandlin, Petitioner v Pat Allen, et al.

499 US 932, 113 L Ed 2d 273, 111 S Ct 1342.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1072, 112 L Ed 2d 857, 111 S Ct 795.

No. 90-6385. Abijah Abiff, Petitioner v Georgia

499 US 933, 113 L Ed 2d 273, 111 S Ct 1342.

March 18, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1072, 112 L Ed 2d 858, 111 S Ct 797.

[499 US 244]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner

v

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY (No. 89-1838)

ALI BOURESLAN, Petitioner

v

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY (No. 89-1845)

499 US 244, 113 L Ed 2d 274, 111 S Ct 1227

[Nos. 89-1838 and 89-1845]

Argued January 16, 1991. Decided March 26, 1991.

Decision: Title VII of Civil Rights Act of 1964 held not to apply extraterritorially to regulate employment practices of United States employers who employ United States citizens abroad.

SUMMARY

Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e—2000e-17) prohibits various discriminatory practices by employers who are "engaged in an industry affecting commerce" (42 USCS § 2000e(b)), with "commerce" defined in part as trade or traffic among the several states "or between a State and any place outside thereof" (42 USCS § 2000e(g)), and "state" defined as including the District of Columbia and specified territories (42 USCS § 2000e(i)). Another provision states that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State" (42 USCS § 2000e-1). A naturalized United States citizen who had been born in Lebanon worked in Saudi Arabia for 4 years as the employee of an oil company which had been incorporated in Delaware. After the employee was discharged by the company, he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and subsequently filed suit against the company in the United States District Court for the Southern District of Texas, which suit sought relief under both state law

Briefs of Counsel, p 753, infra.

and Title VII on a claim that the employee had been harassed and ultimately discharged by the company on account of his race, religion, and national origin. The company moved for summary judgment on the ground that the District Court lacked subject matter jurisdiction over the case because the protections of Title VII do not extend to American citizens employed abroad by American employers; and the District Court, granting that motion, dismissed the Title VII claim and dismissed the state-law claims for lack of pendent jurisdiction (653 F Supp 629). Despite an intervening EEOC policy statement which interpreted Title VII as applying to discrimination against American citizens outside the United States, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment (857 F2d 1014); and, after vacating the panel's decision and rehearing the case en banc, the Court of Appeals again affirmed the District Court's judgment, as the Court of Appeals (1) rejected the argument that § 2000e-1 established, by negative implication, Congress' intent that Title VII protect United States citizens working abroad, and (2) determined that Title VII did not reflect the clear expression of congressional intent required to extend Title VII's reach beyond the borders of the United States (892 F2d 1271).

On certiorari, the United States Supreme Court affirmed. In an opinion by REHNQUIST, Ch. J., joined by WHITE, O'CONNOR, KENNEDY, and SOUTER, JJ., it was held that Title VII does not apply extraterritorially to regulate the employment practices of American employers who employ American citizens abroad, as evidence offered by the employee and the EEOC, though not without probative value, falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond the territorial borders of the United States, in that (1) although the argument that the statute's definitions of its jurisdictional terms show such an intent —because, given the broad definition of "state," the phrase "between a State and any place outside thereof" must refer to areas outside the territorial limit of the United States—is plausible, the language in question is ambiguous and does not speak directly to the point at issue, and similar boilerplate language can be found in numerous other statutes which have never been held to apply overseas; (2) if it were correct that § 2000e-1 makes Title VII applicable to employers overseas, then there would be no way of distinguishing in its application between American and foreign employers, and without a clearer expression of congressional intent, the statute should not be interpreted in a way which would raise difficult issues of international law by applying American laws to foreign corporations operating in foreign commerce; (3) other elements of Title VII suggest a purely domestic focus; (4) if it wished to do so, Congress could clearly state an intention that Title VII apply overseas; and (5) the EEOC's contrary interpretation of Title VII is insufficiently weighty to overcome the presumption against extraterritoriality, given that this interpretation (a) was not contemporaneous with the enactment of Title VII, (b) has not been consistent since the statute came into law, and (c) lacks support in the plain language of the statute.

SCALIA, J., concurred in part and concurred in the judgment, expressing

the view that (1) the state of the law regarding deference to the views of the EEOC is unsettled; and (2) the precedents may be resolved by assuming, without deciding, that the EEOC's view on the extraterritorial application of Title VII was entitled to deference; but (3) given the presumption against extraterritoriality and the requirement that the intent to overcome it be clearly expressed, it is not reasonable to give effect to mere implications from the statutory language as the EEOC has done.

MARSHALL, J., joined by BLACKMUN and STEVENS, JJ., dissented, expressing the view that (1) where all that is sought is to regulate the conduct of United States nationals abroad, the presumption against extraterritoriality (a) is not a "clear statement" rule foreclosing inquiry into extrinsic guides to statutory interpretation, but (b) may properly be relied upon only after exhausting all the traditional tools whereby unexpressed congressional intent may be ascertained; and (2) the language, legislative history, and administrative interpretations of Title VII lead to the inescapable conclusion that Congress intended Title VII to protect American citizens from discrimination by American employers operating overseas, as (a) absent such an intent, Congress would have had no reason to adopt § 2000e-1, (b) although Title VII contained no specific disclaimer as to foreign employers, the application of American laws to foreign nationals abroad raises more serious issues of international comity than their similar application to American citizens, and thus the same statute could be construed as applying to United States nationals and not to foreign nationals, and (c) the EEOC's policy statement is not inconsistent with its previous positions and is reinforced by the longstanding position of the United States Department of Justice.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights §§ 4.4, 58; Statutes §§ 82, 84, 108.5, 134, 160.4 — extraterritorial application of Title VII — administrative interpretation

1a-1e. Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e–2000e-17) does not apply extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad; evidence offered to support a

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45A Am Jur 2d, Job Discrimination § 216; 73 Am Jur 2d, Statutes §§ 356-359

21 Federal Procedure, L Ed, Job Discrimination §§ 50:81-50:83

2 Am Jur Proof of Facts 2d 187, Racial Discrimination in Employment (In General; Use of Statistics)

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts

42 USCS §§ 2000e, 2000e-1

RIA Employment Coordinator ¶ EP-16,123

RIA Employment Discrimination Coordinator ¶ 23,223

L Ed Digest, Civil Rights § 58; Statutes § 84

L Ed Index, Civil Rights; Job Discrimination; Statutes; Territorial Jurisdiction or Limitations

Index to Annotations, Discrimination; Equal Employment Opportunity; Labor and Employment; Statutes; Territorial Jurisdiction or Limitations

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. 39 L Ed 2d 942.

Racial discrimination in labor and employment—Supreme Court cases. 28 L Ed 2d 928.

Actionability, under federal and state antidiscrimination legislation, of foreign employer's discriminating in favor of foreign workers in hiring and other employment matters. 84 ALR Fed 114.

Meaning of term "employer" as defined in § 701(b) of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e(b)). 69 ALR Fed 191.

different interpretation of the statute, though not without probative value, falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond the territorial borders of the United States, in that (1) although it is plausible to argue that the statute's broad jurisdictional provisions, which define affected employers as those who are "engaged in an industry affecting commerce" (42 USCS § 2000e(b)), define "commerce" in part as trade or traffic "between a State and any place outside thereof" (42 USCS § 2000e(g)), and define "state" as including the District of Columbia and specified territories (42 USCS § 2000e(i)), show such an intent—because, given the broad definition of "state," the definition of commerce purportedly must refer to areas outside the territorial limit of the United States—the language in question is ambiguous and does not speak directly to the point at issue, and similar boilerplate language can be found in numerous other statutes which have never been held to apply overseas; (2) if it were correct that § 2000e-1 makes Title VII applicable to employers overseas, then there would be no way of distinguishing in its application between American and foreign employers, and without a clearer expression of congressional intent, the statute should not be interpreted in a way which would raise difficult issues of international law by applying the laws of the United States to foreign corporations operating in foreign commerce; (3) other elements in Title VII suggest a purely domestic focus, since (a) the statute as a whole indicates a concern that state sovereignty and laws not be unduly interfered with, (b) no mechanisms are provided for overseas enforcement of Title VII, and (c) the subject of conflicts with foreign laws and procedures is not addressed; (4) if it wished to do so, Congress could clearly state an intention that Title VII apply overseas; and (5) a policy statement by the Equal Employment Opportunity Commission (EEOC), which statement interprets Title VII as being intended to apply to American employers abroad, is insufficiently weighty to overcome the presumption against extraterritoriality, given that this interpretation (a) was not contemporaneous with the enactment of Title VII, but was enunciated 24 years later, (b) has not been consistent since the statute came into law, but was contradicted by early EEOC pronouncements that Title VII protects "both citizens and noncitizens, domiciled or residing in the United States," and (c) lacks support in the plain language of the statute. (Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Conflict of Laws § 2 — extraterritorial power of Congress

2. Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.

Statutes § 84 — presumption against extraterritoriality

3. It is presumed that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States; this rule serves to protect against unintended clashes between the laws of the United States and those of other nations, which clashes could result in international discord; in applying this rule of construction, the courts look

to see whether language in the relevant legislation gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control; the courts assume that Congress legislates against the backdrop of the presumption against extraterritoriality, and therefore, unless the affirmative intention of Congress is clearly expressed, the courts must presume that Congress is primarily concerned with domestic conditions.

Evidence § 97 — extraterritorial effect of statute — burden of proof

4. In an action by a United States citizen against a United States corporation which employed that citizen abroad, which action alleges that the corporation violated Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e—2000e-17) by harassing and ultimately discharging the citizen on account of his race, religion, and national origin, it is the citizen and the Equal Employment Opportunity Commission who must make an affirmative showing in support of their contention that, contrary to the general presumption against extraterritorial effect of statutes, Title VII is intended to apply to the employment practices of United States employers who employ United States citizens abroad.

SYLLABUS BY REPORTER OF DECISIONS

Petitioner Boureslan, a naturalized United States citizen born in Lebanon and working in Saudi Arabia, was discharged by his employer, respondent Arabian American Oil Company, a Delaware corporation. After filing a charge with petitioner Equal Employment Opportunity Commission (EEOC), he instituted suit in the District Court, seeking relief under, inter alia, Title VII of the Civil Rights Act of 1964 on the ground that he had been discriminated against because of his race, religion, and national origin. In dismissing this claim, the court ruled that it lacked subject-matter jurisdiction because Title VII's protections do not extend to United States citizens employed abroad by American employers. The Court of Appeals affirmed.

Held: Title VII does not apply extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad. Petitioners' evidence, while not totally lacking in probative value, falls short of demonstrating the clearly expressed affirmative congressional intent that is required to overcome the well-established presumption against statutory extraterritoriality.

(a) Petitioners argue unpersuasively that Title VII's "broad jurisdictional language"—which extends the Act's protections to commerce "between a State and any place outside thereof"—evinces a clear intent to legislate extraterritorially. The language relied on is ambiguous, does not speak directly to the question presented here, and constitutes boiler-plate language found in any number of congressional Acts, none of which have been held to apply overseas. Petitioners' argument also finds no support in this Court's decisions, which have repeatedly held that even statutes containing broad language in their definitions of "commerce" that expressly refer to "*foreign* commerce" do not apply abroad. See, e.g., McCulloch v Socie-

dad Nacional de Marineros de Honduras, 372 US 10, 15, 19, 9 L Ed 2d 547, 83 S Ct 671. Steele v Bulova Watch Co., 344 US 280, 286, 97 L Ed 319, 73 S Ct 252, distinguished.

(b) Petitioners also argue unpersuasively that Title VII's "alien exemption" clause—which renders the statute inapplicable "to an employer with respect to the employment of aliens outside any State"—clearly manifests the necessary congressional intent to cover employers of United States *citizens* working abroad. If petitioners were correct, there would be no statutory basis for distinguishing between American employers and foreign employers. Absent clearer evidence of congressional intent, this Court is unwilling to ascribe to Congress a policy which would raise difficult international law issues by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce. This conclusion is fortified by other factors suggesting a purely domestic focus, including Title VII's failure even to mention foreign nations or proceedings despite a number of provisions indicating a concern that the sovereignty and laws of States not be unduly interfered with, and the Act's failure to provide any mechanisms for its overseas enforcement. It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures, as it did in amending the Age Discrimination in Employment Act of 1967 (ADEA) to apply abroad.

(c) Petitioners' contention that this Court should defer to the EEOC's position that Title VII applies abroad is rejected. The EEOC's interpretation does not fare well under the deference standards set forth in General Electric Co. v Gilbert, 429 US 125, 140-146, 50 L Ed 2d 343, 97 S Ct 401, since the interpretation has been neither contemporaneous with Title VII's enactment nor consistent with an earlier, contrary position enunciated by the EEOC closer to the date the statute came into law, since the EEOC offers no basis in its experience for the change, and since the interpretation lacks support in the statute's plain language. Although this Court does not wholly discount the interpretation, it is of insufficient weight, even when considered in combination with petitioners' other arguments, to overcome the presumption against extraterritorial application.

(d) Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has legislated extraterritoriality, including its amendment of the ADEA. Congress may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that this Court cannot.

892 F2d 1271, affirmed.

Rehnquist, C.J., delivered the opinion of the Court, in which White, O'Connor, Kennedy, and Souter, JJ., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment. Marshall, J., filed a dissenting opinion, in which Blackmun and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Solicitor General **Kenneth W. Starr** argued the cause for petitioners in both cases.

Paul L. Friedman argued the cause for respondents.

Briefs of Counsel, p 753, infra.

OPINION OF THE COURT

[499 US 246]

Chief Justice **Rehnquist** delivered the opinion of the Court.

[1a] These cases present the issue whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad. The United States Court of Appeals for the Fifth

[499 US 247]

Circuit held that it does not, and we agree with that conclusion.

Petitioner Boureslan is a naturalized United States citizen who was born in Lebanon. The respondents are two Delaware corporations, Arabian American Oil Company (Aramco), and its subsidiary, Aramco Service Company (ASC). Aramco's principal place of business is Dhahran, Saudi Arabia, and it is licensed to do business in Texas. ASC's principal place of business is Houston, Texas.

In 1979, Boureslan was hired by ASC as a cost engineer in Houston. A year later he was transferred, at his request, to work for Aramco in Saudi Arabia. Boureslan remained with Aramco in Saudi Arabia until he was discharged in 1984. After filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission), he instituted this suit in the United States District Court for the Southern District of Texas against Aramco and ASC. He sought relief under both state law and Title VII of the Civil Rights Act of 1964, 78 Stat 253, as amended, 42 USC §§ 2000e—2000e-17 [42 USCS §§ 2000e—2000e-17], on the ground that he was harassed and ultimately discharged by respondents on account of his race, religion, and national origin.

Respondents filed a motion for summary judgment on the ground that the District Court lacked subject-matter jurisdiction over Boureslan's claim because the protections of Title VII do not extend to United States citizens employed abroad by American employers. The District Court agreed and dismissed Boureslan's Title VII claim; it also dismissed his state-law claims for lack of pendent jurisdiction and entered final judgment in favor of respondents. A panel for the Fifth Circuit affirmed. After vacating the panel's decision and rehearing the case en banc, the court affirmed the District Court's dismissal of Boureslan's complaint. Both Boureslan and the EEOC petitioned for certiorari. We granted both petitions for certiorari to resolve this important issue of statutory interpretation.

[499 US 248]

[2] Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Cf. Foley Bros., Inc. v Filardo, 336 US 281, 284-285, 93 L Ed 680, 69 S Ct 575 (1949); Benz v Compania Naviera Hidalgo, S. A. 353 US 138, 147, 1 L Ed 2d 709, 77 S Ct 699 (1957). Whether Congress has in fact exercised that authority in this case is a matter of statutory construction. It is our task to determine whether

Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States.

[3] It is a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Foley Bros. 336 US, at 285, 93 L Ed 680, 69 S Ct 575. This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." Ibid. It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. See McCulloch v Sociedad Nacional de Marineros de Honduras, 372 US 10, 20-22, 9 L Ed 2d 547, 83 S Ct 671 (1963).

In applying this rule of construction, we look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control" Foley Bros., supra, at 285, 93 L Ed 680, 69 S Ct 575. We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "the affirmative intention of the Congress clearly expressed," Benz, supra, at 147, 1 L Ed 2d 709, 77 S Ct 699, we must presume it "is primarily concerned with domestic conditions." Foley Bros., supra, at 285, 93 L Ed 680, 69 S Ct 575.

[1b] Boureslan and the EEOC contend that the language of Title VII evinces a clearly expressed intent on behalf of Congress to legislate extraterritorially. They rely principally on two provisions of the statute. First, petitioners argue that the statute's definitions of the jurisdictional terms "employer"

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and "commerce" are sufficiently broad to include United States firms that employ American citizens overseas. Second, they maintain that the statute's "alien exemption" clause, 42 USC § 2000e-1 [42 USCS § 2000e-1], necessarily implies that Congress intended to protect American citizens from employment discrimination abroad. Petitioners also contend that we should defer to the EEOC's consistently held position that Title VII applies abroad. We conclude that petitioners' evidence, while not totally lacking in probative value, falls short of demonstraing the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders.

Title VII prohibits various discriminatory employment practices based on an individual's race, color, religion, sex, or national origin. See §§ 2000e-2, 2000e-3. An employer is subject to Title VII if it has employed 15 or more employees for a specified period and is "engaged in an industry affecting commerce." An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [(LMRDA)] [29 USC 401 et seq. [29 USCS §§ 401 et seq.]]." § 2000e(h). "Commerce," in turn, is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any

place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." § 2000e(g).

Petitioners argue that by its plain language, Title VII's "broad jurisdictional language" reveals Congress's intent to extend the statute's protections to employment discrimination anywhere in the world by a United States employer who affects trade "between a State and any place outside thereof." More precisely, they assert that since Title VII

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defines "States" to include States, the District of Columbia, and specified territories, the clause "between a State and any place outside thereof" must be referring to areas beyond the territorial limit of the United States. Reply Brief for Petitioner 3.

Respondents offer several alternative explanations for the statute's expansive language. They contend that the "or between a State and any place outside thereof" clause "provide[s] the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce" but not to "regulate conduct exclusively *within* a foreign country." Brief for Respondents 21, n 14. They also argue that since the definitions of the terms "employer," "commerce," and "industry affecting commerce" make no mention of "commerce with foreign nations," Congress cannot be said to have intended that the statute apply overseas. In support of this argument, petitioners point to Title II of the Civil Rights Act of 1964, governing public accommodation, which specifically defines commerce as it applies to foreign nations. Finally, respondents argue that while language present in the first bill considered by the House of Representatives contained the terms "foreign commerce" and "foreign nations," those terms were deleted by the Senate before the Civil Rights Act of 1964 was passed. They conclude that these deletions "[are] inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially." Brief for Respondents 7.

[1c, 4] We need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application discussed above. Each is plausible, but no more persuasive than that. The language relied upon by petitioners—and it is they who must make the affirmative showing—is ambiguous, and does not speak directly to the question presented here. The intent of Congress as to the extraterritorial application of this

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statute must be deduced by inference from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas. See, e.g., Consumer Product Safety Act, 15 USC § 2052(a)(12) [15 USCS § 2052(a)(12)]; Federal Food, Drug, and Cosmetic Act, 21 USC § 321(b) [21 USCS § 321(b)]; Transportation Safety Act of 1974, 49 USC App § 1802(1) [49 USCS Appx § 1802(1)]; Labor-Management Reporting and Disclosure Act of 1959, 29 USC § 401 et seq. [29 USCS §§ 401 et seq.]; Americans with Disabilities Act of 1990, 42 USC § 1201 et seq. [29 USCS §§ 1201 et seq.].

[1d] Petitioners' reliance on Title VII's jurisdictional provisions also finds no support in our case law; we

have repeatedly held that even statutes that contain broad language in their definitions of "commerce" that expressly refer to "*foreign* commerce" do not apply abroad. For example, in New York Central R. Co. v Chisholm, 268 US 29, 69 L Ed 828, 45 S Ct 402, 38 ALR 1048 (1925), we addressed the extraterritorial application of the Federal Employers' Liability Act (FELA), 45 USC § 51 et seq. [45 USCS §§ 51 et seq.] FELA provides that common carriers by railroad while engaging in "interstate or foreign commerce" or commerce between "any of the States or territories and any foreign nation or nations" shall be liable in damages to its employees who suffer injuries resulting from their employment. § 51. Despite this broad jurisdictional language, we found that the Act "contains no words which definitely disclose an intention to give it extraterritorial effect," Chisholm, supra, at 31, 69 L Ed 828, 45 S Ct 402, 38 ALR 1048, and therefore there was no jurisdiction under FELA for a damages action by a United States citizen employed on a United States railroad who suffered fatal injuries at a point 30 miles north of the United States border into Canada.

Similarly, in McCulloch v Sociedad Nacional de Marineros de Honduras, 372 US 10, 9 L Ed 2d 547, 83 S Ct 671 (1963), we addressed whether Congress intended the National Labor Relations Act (NLRA), 29 USC §§ 151-168 [29 USCS §§ 151-168], to apply overseas. Even though the NLRA contained broad language that referred by its terms to foreign commerce, § 152(6), this Court refused to find a congressional intent to apply the statute abroad

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because there was not "any specific language" in the Act reflecting congressional intent to do so. McCulloch, supra, at 19, 9 L Ed 2d 547, 83 S Ct 671.

The EEOC places great weight on an assertedly similar "broad jurisdictional grant in the Lanham Act" that this Court held applied extraterritorially in Steele v Bulova Watch Co. 344 US 280, 286, 97 L Ed 319, 73 S Ct 252 (1952). Brief for Petitioner in No. 89-1838, p 12. In Steele, we addressed whether the Lanham Act, designed to prevent deceptive and misleading use of trademarks, applied to acts of a United States citizen consummated in Mexico. The Act defined commerce as "all commerce which may lawfully be regulated by Congress." 15 USC § 1127 [15 USCS § 1127]. The stated intent of the statute was "to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce." Ibid. While recognizing that "the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears," the Court concluded that in light of the fact that the allegedly unlawful conduct had some effects within the United States, coupled with the Act's "broad jurisdictional grant" and its "sweeping reach into 'all commerce which may lawfully be regulated by Congress,' " the statute was properly interpreted as applying abroad. Steele, supra, at 285, 287, 97 L Ed 319, 73 S Ct 252.

The EEOC's attempt to analogize these cases to Steele is unpersuasive. The Lanham Act by its terms applies to "all commerce which may lawfully be regulated by Congress." The Constitution gives Congress the power "[t]o regulate Commerce with for-

eign Nations, and among the several States, and with the Indian Tribes." US Const, Art I, § 8, cl 3. Since the Act expressly stated that it applied to the extent of Congress' power over commerce, the Court in Steele concluded that Congress intended that the statute apply abroad. By contrast, Title VII's more limited, boilerplate "commerce" language does not support such an expansive construction of congressional intent. Moreover, unlike

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the language in the Lanham Act, Title VII's definition of "commerce" was derived expressly from the LMRDA, a statute that this Court had held, prior to the enactment of Title VII, did not apply abroad. McCulloch, supra, at 15, 9 L Ed 2d 547, 83 S Ct 671.

Thus petitioner's argument based on the jurisdictional language of Title VII fails both as a matter of statutory language and of our previous case law. Many Acts of Congress are based on the authority of that body to regulate commerce among the several States, and the parts of these Acts setting forth the basis for legislative jurisdiction will obviously refer to such commerce in one way or another. If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.

Petitioners argue that Title VII's "alien exemption provision," 42 USC § 2000e-1 [42 USCS § 2000e-1], "clearly manifests an intention" by Congress to protect United States citizens with respect to their employment outside of the United States. The alien-exemption provision says that the statute "shall not apply to an employer with respect to the employment of aliens outside any State." Petitioners contend that from this language a negative inference should be drawn that Congress intended Title VII to cover United States *citizens* working abroad for United States employers. There is "[n]o other plausible explanation [that] the alien exemption exists," they argue, because "[i]f Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States." Brief for Petitioner in No. 89-1838, pp 12-13. Since "[t]he statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States," petitioners conclude that "Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose

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all potential extraterritorial applications of the statute." Id., at 13.

Respondents resist petitioners' interpretation of the alien-exemption provision and assert two alternative raisons d'être for that language. First, they contend that since aliens are included in the statute's definition of employee,* and the definition

* Title VII defines "employee" as:
"an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision." 42 USC § 2000e(f) [42 USCS § 2000e(f)].

of commerce includes possessions as well as "States," the purpose of the exemption is to provide that employers of aliens in the possessions of the United States are not covered by the statute. Thus, the "outside any State" clause means outside any State, but within the control of the United States. Respondents argue that "[t]his reading of the alien exemption provision is consistent with and supported by the historical development of the provision" because Congress' inclusion of the provision was a direct response to this Court's interpretation of the term "possessions" in the Fair Labor Standards Act in Vermilya-Brown Co. v Connell, 335 US 377, 93 L Ed 76, 69 S Ct 140 (1948), to include leased bases in foreign nations that were within the control of the United States. Brief for Respondents 27. They conclude that the alien-exemption provision was included "to limit the impact of Vermilya-Brown by excluding from coverage employers of aliens in areas under US control that" were not encompassed within Title VII's definition of the term "State." Id., at 29.

Second, respondents assert that by negative implication, the exemption "confirm[s] the coverage of aliens in the United States." Id., at 26. They contend that this interpretation

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is consistent with our conclusion in Espinoza v Farah Mfg. Co., 414 US 86, 38 L Ed 2d 287, 94 S Ct 334 (1973), that aliens within the United States are protected from discrimination both because Title VII uses the term "individual" rather than "citizen," and because of the alien-exemption provision.

If petitioners are correct that the alien-exemption clause means that the statute applies to employers overseas, we see no way of distinguishing in its application between United States employers and foreign employers. Thus, a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk. The EEOC assures us that in its view the term "employer" means only "American employer," but there is no such distinction in this statute and no indication that the EEOC in the normal course of its administration had produced a reasoned basis for such a distinction. Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

This conclusion is fortified by the other elements in the statute suggesting a purely domestic focus. The statute as a whole indicates a concern that it not unduly interfere with the sovereignty and laws of the States. See, e.g., 42 USC § 2000h-4 [42 USCS § 2000h-4] (stating that the Act should not be construed to exclude the operation of state law or invalidate any state law unless inconsistent with the purposes of the Act); § 2000e-5 (requiring the EEOC to accord substantial weight to findings of state or local authorities in proceedings under state or local law); § 2000e-7 (providing that nothing in Title VII shall affect the application of state or local law unless such law requires or permits prac-

tices that would be unlawful under Title VII); §§ 2000e-5(c), (d), and (e) (provisions addressing deferral to state discrimination proceedings).

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While Title VII consistently speaks in terms of "States" and state proceedings, it fails even to mention foreign nations or foreign proceedings.

Similarly, Congress failed to provide any mechanisms for overseas enforcement of Title VII. For instance, the statute's venue provisions, § 2000e-5(f)(3), are ill-suited for extraterritorial application as they provide for venue only in a judicial district in the State where certain matters related to the employer occurred or were located. And the limited investigative authority provided for the EEOC, permitting the Commission only to issue subpoenas for witnesses and documents from "any place in the United States or any Territory or possession thereof," 29 USC § 161 [29 USCS § 161], incorporated by reference into 42 USC § 2000e-9 [42 USCS § 2000e-9], suggests that Congress did not intend for the statute to apply abroad.

It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures. In amending the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat 602, as amended, 29 USC § 621 et seq. [29 USCS §§ 621 et seq.], to apply abroad, Congress specifically addressed potential conflicts with foreign law by providing that it is not unlawful for an employer to take any action prohibited by the ADEA "where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located." § 623(f)(1). Title VII, by contrast, fails to address conflicts with the laws of other nations.

Finally, the EEOC, as one of the two federal agencies with primary responsibility for enforcing Title VII, argues that we should defer to its "consistent" construction of Title VII, first formally expressed in a statement issued after oral argument but before the Fifth Circuit's initial decision in this case, Policy Statement No. N-915.033, BNA EEOC Compliance Manual § 605:0055 (Apr. 1989), "to apply to discrimination against

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American citizens outside the United States." Brief for Petitioner in No. 89-1838, p 22. Citing a 1975 letter from the EEOC's General Counsel, 1983 testimony by its Chairman, and a 1985 decision by the Commission, it argues that its consistent administrative interpretations "reinforce" the conclusion that Congress intended Title VII to apply abroad.

In General Electric Co. v Gilbert, 429 US 125, 140-146, 50 L Ed 2d 343, 97 S Ct 401 (1976), we addressed the proper deference to be afforded the EEOC's guidelines. Recognizing that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations," we held that the level of deference afforded " 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " Id., at 141, 142, 50 L Ed 2d 343, 97 S Ct 401 (quoting Skidmore v Swift & Co. 323 US 134, 140, 89 L Ed 124, 65 S Ct 161 (1944)).

The EEOC's interpretation does not fare well under these standards. As an initial matter, the position taken by the Commission "contradicts the position which [it] had enunciated at an earlier date, closer to the enactment of the governing statute." General Electric Co., supra, at 142, 50 L Ed 2d 343, 97 S Ct 401. The Commission's early pronouncements on the issue supported the conclusion that the statute was limited to domestic application. See 29 CFR § 1606.1(c) (1971) ("Title VII . . . protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin"). While the Commission later intimated that the statute applied abroad, this position was not expressly reflected in its policy guidelines until some 24 years after the passage of the statute. The EEOC offers no basis in its experience for the change. The EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law. As discussed above, it also lacks support in the plain language of the statute.

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While we do not wholly discount the weight to be given to the 1988 guideline, its persuasive value is limited when judged by the standards set forth in Skidmore. Accord, Southeastern Community College v Davis, 442 US 397, 411-412, 60 L Ed 2d 980, 99 S Ct 2361 (1979); SEC v Sloan, 436 US 103, 117-118, 56 L Ed 2d 148, 98 S Ct 1702 (1978); Espinoza v Farah Mfg. Co. 414 US, at 93-94, 38 L Ed 2d 287, 94 S Ct 334. We are of the view that, even when considered in combination with petitioners' other arguments, the EEOC's interpretation is insufficiently weighty to overcome the presumption against extraterritorial application.

Our conclusion today is buttressed by the fact that "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." Argentine Republic v Amerada Hess Shipping Corp. 488 US 428, 440, 102 L Ed 2d 818, 109 S Ct 683 (1989). Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute. See, e.g., the Export Administration Act of 1979, 50 USC App § 2415(2) [50 USCS Appx § 2415(2)] (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern"); Coast Guard Act, 14 USC § 89(a) [14 USCS § 89(a)] (Coast Guard searches and seizures upon the high seas); 18 USC § 7 [18 USCS § 7] (Criminal Code extends to high seas); 19 USC § 1701 [19 USCS § 1701] (Customs enforcement on the high seas); Comprehensive Anti-Apartheid Act of 1986, 22 USC § 5001(5)(A) [22 USCS § 5001(5)(A)] (definition of "national of the United States" as "a natural person who is a citizen of the United States . . ."); the Logan Act, 18 USC § 953 [18 USCS § 953] (applying Act to "[a]ny citizen . . . wherever he may be . . ."). Indeed, after several courts had held that the ADEA did

not apply overseas, Congress amended § 11(f) to provide: "The term 'employee' includes any individual who is a citizen of the United States employed

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by an employer in a workplace in a foreign country." 29 USC § 630(f) [29 USCS § 630(f)]. Congress also amended § 4(g)(1), which states: "If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer." § 623(h)(1). The expressed purpose of these changes was to "mak[e] provisions of the Act apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries." S Rep No. 98-467, p 2 (1984). Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot.

[1e] Petitioners have failed to present sufficient affirmative evidence that Congress intended Title VII to apply abroad. Accordingly, the judgment of the Court of Appeals is affirmed.

SEPARATE OPINIONS

Justice **Scalia,** concurring in part and concurring in the judgment.

I join the judgment of the Court and its opinion except that portion, ante, at 256-258, 113 L Ed 2d, at 287-288, asserting that the views of the Equal Employment Opportunity Commission—not only with respect to the particular point at issue here but apparently as a general matter —are not entitled to the deference normally accorded administrative agencies under Chevron U. S. A. Inc. v Natural Resources Defense Council, Inc., 467 US 837, 81 L Ed 2d 694, 104 S Ct 2778 (1984). The case relied upon for the proposition that the EEOC's interpretations have only the force derived from their "power to persuade" was decided in an era when we were disposed to give deference (as opposed to "persuasive force") only to so-called "legislative regulations." The reasoning of General Electric Co. v Gilbert, 429 US 125, 50 L Ed 2d 343, 97 S Ct 401 (1976) was not that the EEOC (singled out from other agencies) was not entitled to deference, but that the EEOC's *guidelines,* like the guidelines of all agencies without explicit rulemaking

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power, could not be considered legislative rules and therefore could not be accorded deference. See id., at 141, 50 L Ed 2d 343, 97 S Ct 401.

In an era when our treatment of agency positions is governed by Chevron, the "legislative rules vs other action" dichotomy of Gilbert is an anachronism; and it is not even a correct description of that anachronism to say that Gilbert held that the EEOC (as opposed to all agency action other than legislative rules) is not entitled to deference. We recognized that only three years ago in EEOC v Commercial Office Products Co., 486 US 107, 100 L Ed 2d 96, 108 S Ct 1666 (1988)—which case, rather than Gilbert, was our last word on deference to the EEOC. We said, in language quite familiar from our cases following Chevron, that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." Id., at 115, 100 L Ed 2d 96, 108 S Ct 1666.

Commercial Office Products has not been overruled (or even mentioned) in today's opinion, so that the state of the law regarding deference to the EEOC is left unsettled.

I would resolve these cases by assuming, without deciding, that the EEOC was entitled to deference on the particular point in question. But deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ. Given the presumption against extraterritoriality that the Court accurately describes, and the requirement that the intent to overcome it be "clearly expressed," it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done. Cf. Sunstein, Law and Administration after Chevron, 90 Colum L Rev 2071, 2114 (1990).

On all other points, I join the opinion of the Court.

Justice **Marshall,** with whom Justice **Blackmun** and Justice **Stevens** join, dissenting.

Like any issue of statutory construction, the question whether Title VII protects United States citizens from discrimination by United States employers abroad turns solely on congressional intent. As the majority recognizes, our inquiry

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into congressional intent in this setting is informed by the traditional "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Foley Bros., Inc. v Filardo, 336 US 281, 285, 93 L Ed 680, 69 S Ct 575 (1949). But contrary to what one would conclude from the majority's analysis, this canon is *not* a "clear statement" rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will. Rather, as our case law applying the presumption against extraterritoriality well illustrates, a court may properly rely on this presumption only after exhausting all of the traditional tools "whereby unexpressed congressional intent may be ascertained." Ibid. When these tools are brought to bear on the issue in this case, the conclusion is inescapable that Congress *did* intend Title VII to protect United States citizens from discrimination by United States employers operating overseas. Consequently, I dissent.

I

Because it supplies the driving force of the majority's analysis, I start with "[t]he canon . . . that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Ibid. The majority recasts this principle as "the need to make *a clear statement* that a statute applies overseas." Ante, at 258, 113 L Ed 2d, at 288 (emphasis added). So conceived, the presumption against extraterritoriality allows the majority to derive meaning from various instances of statutory silence—from Congress' failure, for instance, "to mention foreign nations or foreign proceedings," ante, at 256, 113 L Ed 2d, at 287, "to provide any mechanisms for overseas enforcement," ibid., or

to "addres[s] the subject of conflicts with foreign laws and procedures," ante, at 256, 113 L Ed 2d, at 287. At other points, the majority relies on its reformulation of the presumption to avoid the "need [to] choose between . . . competing interpretations" of affirmative statutory

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language that the majority concludes "does not speak *directly* to the question" of extraterritoriality. Ante, at 250, 113 L Ed 2d, at 283 (emphasis added). In my view, the majority grossly distorts the effect of this rule of construction upon conventional techniques of statutory interpretation.

Our most extensive discussion of the presumption against extraterritoriality can be found in Foley Brothers, supra. The issue in that case was whether the Eight Hour Law—a statute regulating the length of the workday of employees hired to perform contractual work for the United States—applied to construction projects in foreign nations. After noting "the assumption that Congress is primarily concerned with domestic conditions," the Court concluded that there was "nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case." 336 US, at 285, 93 L Ed 680, 69 S Ct 575. The Court put particular emphasis on "[t]he scheme of the Act," including Congress' failure to draw a "distinction . . . therein between laborers who are aliens and those who are citizens of the United States." Id., at 286, 93 L Ed 680, 69 S Ct 575. "The absence of any [such] distinction," the Court explained, "indicates . . . that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress." Ibid. The Court also engaged in extended analyses of the legislative history of the statute, see id., at 286-288, 93 L Ed 680, 69 S Ct 575, and of pertinent administrative interpretations, see id., at 288-290, 93 L Ed 680, 69 S Ct 575.

The range of factors that the Court considered in Foley Brothers demonstrates that the presumption against extraterritoriality is *not* a "clear statement" rule. Clear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them. See, e.g., Webster v Doe, 486 US 592, 601, 603, 100 L Ed 2d 632, 108 S Ct 2047 (1988); Atascadero State Hospital v Scanlon, 473 US 234, 242-243, 87 L Ed 2d 171, 105 S Ct 3142 (1985); Kent v Dulles, 357

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US 116, 130, 2 L Ed 2d 1204, 78 S Ct 1113 (1958). When they apply, such rules foreclose inquiry into extrinsic guides to interpretation, see, e.g., Dellmuth v Muth, 491 US 223, 230, 105 L Ed 2d 181, 109 S Ct 2397 (1989), and even compel courts to select less plausible candidates from within the range of permissible constructions, see, e.g., Edward J. DeBartolo Corp. v Florida Gulf Coast Building & Construction Trades Council, 485 US 568, 575, 99 L Ed 2d 645, 108 S Ct 1392 (1988). The Court's analysis in Foley Brothers was by no means so narrowly constrained. Indeed, the Court considered the entire range of conventional sources "whereby *unexpressed* congressional intent may be ascertained," 336 US, at 285, 93 L Ed 680,

69 S Ct 575 (emphasis added),[1] including legislative history, statutory structure, and administrative interpretations. Subsequent applications of the presumption against extraterritoriality confirm that we have not imposed the drastic clear-statement burden upon Congress before giving effect to its intention that a particular enactment apply beyond the national boundaries. See, e. g., Steele v Bulova Watch Co. 344 US 280, 286-287, 97 L Ed 319, 73 S Ct 252 (1952) (relying on "broad jurisdictional grant" to find intention that Lanham Act applies abroad).

The majority converts the presumption against extraterritoriality into a clear-statement rule in part through selective quotation. Thus, the majority reports that the Court in New York Central R. Co. v Chisholm, 268 US 29, 69 L Ed 828, 45 S Ct 402, 38 ALR 1048 (1925), declined to construe the Federal Employers Liability Act to apply extraterritorially because it concluded that the statute " 'contains no words which definitely disclose an intention to give it extraterritorial effect,' " ante, at 251, 113 L Ed 2d, at 284, quoting 268 US, at 31, 69 L Ed 828, 45 S Ct 402, 38 ALR 1048. The majority omits the remainder of the quoted sentence, which states, "nor do *the circumstances* require an inference of such purpose." 268 US, at 31, 69 L Ed 828, 45 S Ct 402, 38 ALR 1048 (emphasis added). Similarly, the majority notes that the Court in McCulloch v Sociedad Nacional de Marineros de Honduras, 372 US 10, 9 L Ed 2d 547, 83 S Ct 671 (1963), did not find " 'any specific language' " in the National

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Labor Relations Act indicating that Congress expected the statute to apply to foreign-flag ships. Ante, at 252, 113 L Ed 2d, at 284, quoting 372 US, at 19, 9 L Ed 2d 547, 83 S Ct 671. The full sentence states: "But, as in Benz [v Compania Naviera Hidalgo, S. A, 353 US 138 [1 L Ed 2d 709, 77 S Ct 699] (1957)], [petitioners] have been unable to point to any specific language in the Act itself *or in its extensive legislative history* that reflects such a congressional intent." 372 US, at 19, 9 L Ed 2d 547, 83 S Ct 671 (emphasis added).

The majority also overstates the strength of the presumption by drawing on language from cases involving a wholly independent rule of construction: "that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .' " McCulloch v Sociedad Nacional, supra, at 21, 9 L Ed 2d 547, 83 S Ct 671, quoting The Charming Betsy, 2 Cranch 64, 118, 2 L Ed 208 (1804) (Marshall, C. J.); see Benz v Compania Naviera Hidalgo, S. A. 353 US 138, 146-147, 1 L Ed 2d 709, 77 S Ct 699 (1957). At issue in Benz was whether the Labor Management Relations Act of 1947 "applie[d] to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." Id., at 138-139, 1 L Ed 2d 709, 77 S Ct 699. Construing the statute to apply under such circumstances would have displaced labor regulations that were founded on the law of another nation and that were applicable solely to foreign nationals. Id., at 139, 142, 146, 1 L

1. The majority quotes this language, see ante, at 248, 113 L Ed 2d, at 282, but then proceeds to disregard it completely in the course of its analysis.

Ed 2d 709, 77 S Ct 699. In language quoted in the majority's opinion, see ante, at 248, 113 L Ed 2d, at 282, the Court stated that there must be present "the affirmative intention of the Congress clearly expressed" before it would infer that Congress intended courts to enter "such a delicate field of international relations." Benz, supra, at 147, 1 L Ed 2d 709, 77 S Ct 699. Similarly, in McCulloch, the Court focused on the absence of " 'the affirmative intention of the Congress clearly expressed,' " in declining to apply the National Labor Relations Act to foreign-flag vessels with foreign crews. 372 US, at 22, 9 L Ed 2d 547, 83 S Ct 671, quoting Benz, supra, at 147, 1 L Ed 2d 709, 77 S Ct 699. Extraterritorial application in McCulloch would have violated not only "the

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well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," 372 US, at 21, 9 L Ed 2d 547, 83 S Ct 671, but also regulations issued by the State Department, see id., at 20, and n 11, 9 L Ed 2d 547, 83 S Ct 671.

Far from equating Benz and McCulloch's clear-statement rule with Foley's presumption against extraterritoriality, the Court has until now recognized that Benz and McCulloch are reserved for settings in which the extraterritorial application of a statute would "implicat[e] sensitive issues of the authority of the Executive over relations with foreign nations." NLRB v Catholic Bishop of Chicago, 440 US 490, 500, 59 L Ed 2d 533, 99 S Ct 1313 (1979); see Weinberger v Rossi, 456 US 25, 32, 71 L Ed 2d 715, 102 S Ct 1510 (1982) (McCulloch rule designed to avoid constructions that raise "foreign policy implications"); Longshoremen v Ariadne Shipping Co., 397 US 195, 198-199, 25 L Ed 2d 218, 90 S Ct 872 (1970) (declining to follow Benz and McCulloch in setting in which United States citizens were employed by foreign vessels). The strictness of the McCulloch and Benz presumption permits the Court to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a statute to displace the domestic law of another nation. See NLRB v Catholic Bishop of Chicago, supra, at 500, 59 L Ed 2d 533, 99 S Ct 1313. Nothing nearly so dramatic is at stake when Congress merely seeks to regulate the conduct of United States nationals abroad. See Steele v Bulova Watch Co., supra, at 285-286, 97 L Ed 319, 73 S Ct 352; Skiriotes v Florida, 313 US 69, 73-74, 85 L Ed 1193, 61 S Ct 924 (1941).[2]

Because petitioners advance a construction of Title VII that would extend its extraterritorial reach only to United States nationals, it is the weak presumption of Foley Brothers, not the strict clear-statement rule of Benz and McCulloch,

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that should govern our inquiry here. Under Foley Brothers, a court is not free to invoke the presumption against extraterritoriality until it has exhausted all available indicia of Congress' intent on this subject. Once

2. It is also worth noting that although we have construed McCulloch and Benz as embodying a clear-statement rule, see NLRB v Catholic Bishop of Chicago, 440 US 490, 500, 59 L Ed 2d 533, 99 S Ct 1313 (1979), the Court in both Benz, see 353 US, at 142-146, 1 L Ed 2d 709, 77 S Ct 699, and McCulloch, see 372 US, at 19, 9 L Ed 2d 547, 83 S Ct 671, consulted the legislative history of the statutes at issue in those cases before concluding that neither applied to the facts before the Court.

these indicia are consulted and given effect in this case, I believe there can be no question that Congress intended Title VII to protect United States citizens from discrimination by United States employers abroad.

II

A

Title VII states:

> "It shall be an unlawful employment practice for an employer . . . to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) [42 USCS § 2000e-2(a)(1)].

Under the statute, "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees," § 2000e(b); "[t]he term 'commerce' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof. . . ." § 2000e(g).

These terms are broad enough to encompass discrimination by United States employers abroad. Nothing in the text of the statute indicates that the protection of an "individual" from employment discrimination depends on the location of that individual's workplace; nor does anything in the statute indicate that employers whose businesses affect commerce between "a State and any other place outside thereof" are exempted when their discriminatory conduct occurs beyond the Nation's borders. While conceding that it is "plausible" to infer from the breadth of the statute's central prohibition that Congress intended Title VII to apply extraterritorially,

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ante, at 250, 113 L Ed 2d, at 283, the majority goes to considerable lengths to show that this language is not sufficient to overcome the majority's clear-statement conception of the presumption against extraterritoriality. However, petitioners claim no more—and need claim no more, given additional textual evidence of Congress' intent—than that this language is *consistent* with a legislative expectation that Title VII apply extraterritorially, a proposition that the majority does not dispute.

Confirmation that Congress did *in fact* expect Title VII's central prohibition to have an extraterritorial reach is supplied by the so-called "alien exemption" provision. The alien-exemption provision states that Title VII "shall not apply to an employer with respect to the employment of aliens *outside any State.*" 42 USC § 2000e-1 [42 USCS § 2000e-1] (emphasis added).[3] Absent an intention that Title VII *apply* "outside any State," Congress would have had no reason to craft this extraterritorial exemption. And because only discrimination against aliens is exempted, employers remain accounta-

3. For purposes of Title VII, "[t]he term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 USC 1331 et seq. [43 USCS §§ 1331 et seq.]]." 42 USC § 2000e(i) [42 USCS § 2000e(i)].

ble for discrimination against United States citizens abroad.

The inference arising from the alien-exemption provision is more than sufficient to rebut the presumption against extraterritoriality. Compare Pennsylvania v Union Gas Co. 491 US 1, 105 L Ed 2d 1, 109 S Ct 2273 (1989). In Union Gas, we considered the question whether Congress had stated with sufficient clarity its intention to abrogate the States' Eleventh Amendment immunity under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Based on a limited exemption provision directed at the States, we concluded that Congress had spoken with sufficient clarity; absent "a background understanding" that the general terms of the statute had made the States amenable to suit, we explained,

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the limited exemption "would [have] be[en] unnecessary." Id., at 8, 105 L Ed 2d 1, 109 S Ct 2273. If this logic is sufficiently sharp to pierce the dense armor afforded the States by the clear-statement abrogation rule of Atascadero State Hospital v Scanlon, 473 US, at 242-243, 87 L Ed 2d 171, 105 S Ct 3142; accord, Dellmuth v Muth, 491 US, at 230, 105 L Ed 2d 181, 109 S Ct 2397, then the same logic necessarily overcomes the much weaker presumption against extraterritoriality recognized in Foley Brothers.

The history of the alien-exemption provision confirms the inference that Congress expected Title VII to have extraterritorial application. As I have explained, the Court in Foley Brothers declined to construe the Eight Hour Law to apply extraterritorially in large part because of "[t]he absence of any distinction between citizen and alien labor" under the Law:

> "Unless we were to read such a distinction into the statute we should be forced to conclude . . . that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. . . . An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." 336 US, at 286, 93 L Ed 680, 69 S Ct 575.

The language comprising the alien-exemption provision first appeared in an employment-discrimination bill introduced only seven weeks after the Court decided Foley Brothers, see HR 4453, 81st Cong, 1st Sess (1949), and was clearly aimed at insulating that legislation from the concern that prevented the Court from adopting an extraterritorial construction of the Eight Hour Law. The legislative history surrounding Title VII leaves no doubt that Congress had extraterritorial application in mind when it revived the alien-exemption provision from the earlier antidiscrimination bill:

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> "In section 4 of the Act, a limited exception is provided for employers with respect to employment of aliens outside of any State . . . *The intent of [this] exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise.*" HR Rep No. 570, 88th Cong, 1st Sess 4 (1963) (emphasis added), reprinted in Civil Rights, Hearings on HR

7152, as amended, before Subcommittee No. 5 of the Committee on the Judiciary, 88th Cong, 1st Sess 2303 (Civil Rights Hearings).[4]

See also S Rep No. 867, 88th Cong, 2d Sess, 11 (1964) ("Exempted from the bill are . . . U.S. employers employing citizens of foreign countries *in foreign lands*" (emphasis added)).

Notwithstanding the basic rule of construction requiring courts to give effect to all of the statutory language, see Reiter v Sonotone Corp. 442 US 330, 339, 60 L Ed 2d 931, 99 S Ct 2326 (1979), the majority never advances an alternative explanation of the alien-exemption provision that is consistent with the majority's own conclusion that Congress intended Title VII to have a purely domestic focus. The closest that the majority comes to attempting to give meaning to the alien-exemption provision is to identify without endorsement "two alternative raisons d'être for that language" offered by respondents. Ante, at 254, 113 L Ed 2d, at 285. Neither of these explanations is even minimally persuasive.

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The first is the suggestion that the alien-exemption provision indicates, by negative implication, merely that aliens are covered by Title VII if they are employed *in the United States*. This construction hardly makes sense of the statutory language as a whole; indeed, it hardly makes sense. Under respondents' construction of the statute, no one—neither citizen nor alien—is protected from discrimination abroad. Thus, in order to credit respondents' interpretation of the alien-exemption provision, we must attribute to Congress a decision to enact a completely superfluous exemption solely as a means of signaling its intent that aliens be protected from employment discrimination in this Nation. In addition to being extremely improbable, such a legislative subterfuge would have been completely unnecessary, for as we indicated in Espinoza v Farah Mfg. Co. 414 US 86, 38 L Ed 2d 287, 94 S Ct 334 (1973), Congress clearly communicated its intent to cover aliens working in this country by prohibiting discrimination against "any individual." See id., at 95, 38 L Ed 2d 287, 94 S Ct 334.

Respondent's second explanation is that Congress included the alien-exemption provision in anticipation that courts would otherwise construe Title VII to apply to companies employing aliens in United States "possessions," an outcome supposedly dictated by this Court's decision in Vermilya-Brown Co. v Connell, 335 US 377, 93 L Ed 76, 69 S Ct 140 (1948). This explanation may very well be true, but it only corroborates the conclusion that Congress expected Title VII to apply extraterritorially. Although there is no fixed legal meaning for the term "possession," see id., at 386, 93 L Ed 76, 69 S Ct 140, it is clear that possessions, like foreign nations, are extraterritorial jurisdictions to which the presumption against extraterritorial application of a statute attaches. See

4. The alien-exemption provision was originally part of HR 405, 88th Cong, 1st Sess (1963), reprinted in Civil Rights Hearings, at 2330. This bill, along with others, was incorporated (with amendments immaterial to the alien-exemption provision) into HR 7152, the bill that became the Civil Rights Act of 1964. See HR Rep No. 914, 88th Cong 1st Sess, 57 (1963) (additional views of Rep. Meader). The Committee Report accompanying HR 405 was likewise incorporated into the record of committee hearings held on the various bills from which HR 7152 derived. See Civil Rights Hearings, at 2300.

Foley Bros., supra, at 285, 93 L Ed 680, 69 S Ct 575.[5] Because only one rule of construction applies to both types of jurisdiction, a

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court following Vermilya-Brown and Foley Brothers would have reached the *same* conclusion about the applicability of Title VII to companies employing aliens in possessions and to companies employing aliens in foreign nations. Consequently, if Congress believed that the alien-exemption provision was necessary to protect employers in the former class, it would have had just as much reason to believe that the provision was necessary to protect employers in the latter. In any case, the specific history surrounding the alien-exemption provision makes clear that Congress had the situation of "U.S. employers employing citizens of foreign countries *in foreign lands*" firmly in mind when it enacted that provision. S Rep No. 867, supra, at 11 (emphasis added).

B

Rather than attempting to reconcile its interpretation of Title VII with the language and legislative history of the alien-exemption provision, the majority contents itself with pointing out various legislative silences that, in the majority's view, communicate a congressional intent to limit Title VII to instances of domestic employment discrimination. In particular, the majority claims that, had Congress intended to give Title VII an extraterritorial reach, it "would have addressed the subject of conflicts with foreign laws and procedures," ante, at 256, 113 L Ed 2d, at 287, and would have "provide[d] . . . mechanisms for overseas enforcement," including special venue provisions and extraterritorial investigatory powers for the Equal Employment Opportunity Commission (EEOC), see ibid. The majority also emphasizes Congress' failure to draw an express distinction between extraterritorial application of Title VII to United States employers and extraterritorial application of Title VII to foreign employers. See ante, at 255, 113 L Ed 2d, at 286. In my view, none of these supposed omissions detracts from the conclusion that Congress intended Title VII to apply extraterritorially.

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The majority is simply incorrect in its claim that Congress disregarded the subject of conflicts with foreign law. Congress addressed this concern by enacting the alien-exemption provision, the announced purpose of which was "*to remove conflicts of law* which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." HR Rep No. 570, at 4, reprinted in Civil Rights Hearings, at 2303 (emphasis added). As I have explained, the alien-exemption provision is tailored to avert the very type of potential conflict that prevented the Court from construing the Eight Hour Law to apply extraterritorially in Foley Brothers. Congress could have gone further in addressing the topic of conflicts, but it is not our position to second-guess the balance struck by Congress in this respect.

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5. The presumption was overcome in Vermilya-Brown because the legislation at issue in that case *expressly* applied to United States "possessions." See 335 US, at 379, 386, 93 L Ed 76, 69 S Ct 140; see also Foley Bros. 336 US 281, 285, 93 L Ed 680, 69 S Ct 575 (1949).

The majority also misrepresents the character of Title VII's venue provisions. Title VII provides that venue is proper in various districts related to the underlying charge of discrimination, but also states that

> "if the [employer] is not found within any such district, such an action may be brought within the judicial district in which the [employer] has his principal office." 42 USC § 2000e-5(f)(3) [42 USCS § 2000e-5(f)(3)].

"Principal office" venue would extend to any United States employer doing business abroad. Identical language is found in the venue provision of the Jones Act, 46 USC App § 688(a) [46 USCS Appx § 688(a)], which under appropriate circumstances applies to injuries occurring outside the territorial jurisdiction of the United States, see generally Hellenic Lines Ltd. v Rhoditis, 398 US 306, 308-309, 26 L Ed 2d 252, 90 S Ct 1731 (1970).[6]

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Nor can any inference be drawn from the scope of the EEOC's investigatory powers under the statute. Title VII directs the EEOC to conduct an investigation "[w]henever a charge is filed" under the statute, 42 USC § 2000e-5(b) [42 USCS § 2000e-5(b)]; it also states that the EEOC is to "have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated," § 2000e-8(a). Far from imposing a geographic limitation on either of these powers, Title VII states that the EEOC may "exercise any or all its powers" in the District of Columbia (the site of the EEOC's principal office) or "at *any other place.*" § 2000e-4(f) (emphasis added).

Title VII does limit the reach of the subpoena power of the EEOC, see § 2000e-9; 29 USC § 161(1) [29 USCS § 161(1)], but this limitation does not detract from the potential extraterritorial reach of the agency's investigatory powers. See FTC v Compagnie De Saint-Gobain-Pont-A-Mousson, 205 US App DC 172, 194, 636 F2d 1300, 1322 (1980) (territorial limitation on subpoena power does not prevent extraterritorial investigations). Moreover, Congress has also declined to give extraterritorial-subpoena power to either the EEOC under the Age Discrimination in Employment Act (ADEA), 29 USC §§ 209, 626(a) [29 USCS §§ 209, 626(a)]; 15 USC § 49 [15 USCS § 49], or to the Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 USC § 78u(b) [15 USCS § 78u(b)], even though the former statute expressly applies abroad, 29 USC §§ 623(h)(1), 630(f) [29 USCS §§ 623(h)(1), 630(f)],[7] and

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6. In addition, a United States citizen who suffers employment discrimination abroad may bring a Title VII action against the United States employer in state court, see Yellow Freight System, Inc. v Donnelly, 494 US 820, 108 L Ed 2d 834, 110 S Ct 1566 (1990), to which the venue provisions of Title VII clearly would not apply, see Bainbridge v Merchants & Miners Transp. Co. 287 US 278, 280-281, 77 L Ed 302, 53 S Ct 159 (1932).

7. Congress' amendment of the ADEA to give it extraterritorial application does not reflect a congressional intent that Title VII be confined to domestic application. Congress amended the ADEA in response to lower-court decisions construing the ADEA to apply only domestically. These decisions *distinguished* the ADEA from Title VII in this respect, noting that the former did not contain a provision analogous to the alien-exemption provision. See Cleary v United States Lines, Inc. 728 F2d 607, 609 (CA3 1984); see also Pfeiffer v Wm. Wrigley Jr. Co. 755 F2d 554, 559 (CA7 1985). Sponsors of the ADEA amendment explained that it would make the ADEA and Title VII coextensive in their extraterritorial reach. See 129 Cong Rec 34499 (1983) (statement of Sen. Grassley).

the latter is widely recognized as doing so, see

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Turley, "When in Rome": Multinational Misconduct and the Presumption against Extraterritoriality, 84 Nw U L Rev 598, 613-617 (1990). In short, there simply is no correlation between the scope of an agency's subpoena power and the extraterritorial reach of the statute that the agency is charged with enforcing.

Finally, the majority overstates the importance of Congress' failure expressly to disclaim extraterritorial application of Title VII to foreign employers. As I have discussed, our cases recognize that application of United States law to *United States nationals* abroad ordinarily raises considerably less serious questions of international comity than does the application of United States law to *foreign nationals* abroad. See Steele v Bulova Watch Co. 344 US, at 285-286, 97 L Ed 319, 73 S Ct 252; Skiriotes v Florida, 313 US, at 73-74, 85 L Ed 1193, 61 S Ct 924. It is the latter situation that typically presents the foreign-policy and conflicts-of-law concerns that underlie the clear-statement rule of McCulloch and Benz. Because two different rules of construction apply depending on the national identity of the regulated parties, the *same* statute might be construed to apply extraterritorially to United States nationals but *not* to foreign nationals. Compare Steele v Bulova Watch Co., supra, at 285-287, 97 L Ed 319, 73 S Ct 252 (applying Lanham Act to United States national for conduct abroad) with Vanity Fair Mills, Inc. v T. Eaton Co. 234 F2d 633, 642-643 (CA2) (declining to apply Lanham Act to foreign national for conduct abroad), cert denied, 352 US 871, 1 L Ed 2d 76, 77 S Ct 96 (1956). Cf. Webster v Doe, 486 US, at 599-601, 603, 100 L Ed 2d 632, 108 S Ct 2047 (finding language in judicial-review statute to have different meanings depending on applicability of different rules of construction).

The legislative history of Title VII, moreover, furnishes direct support for such a construction. See HR Rep No. 570, at 4 (explaining that alien-exemption provision applies to "employment of aliens outside the United States by *an*

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American enterprise" (emphasis added)), reprinted in Civil Rights Hearings, at 2303; S Rep No. 867, at 11 (alien-exemption provision directed at "*U.S. employers* employing citizens of foreign countries in foreign lands" (emphasis added)); see also EEOC Policy Statement No. 125, BNA EEOC Compliance Manual 605:0061 (April 1989) (construing nationality of employer abroad to be "significant" under Title VII). Thus, although the issue is not before us in this case, we would not be at a loss for interpretive resources for narrowing Title VII's extraterritorial reach to United States employers should such a construction be necessary in order to avoid conflicts with foreign law.

III

The extraterritorial application of Title VII is supported not only by its language and legislative history but also by pertinent administrative interpretations. See Foley Bros. 336 US, at 288, 93 L Ed 680, 69 S Ct 575. Since 1975, the EEOC has been on record as construing Title VII to apply to United States companies

employing United States citizens abroad:

> "Section [2000e-2(a)(1)] provides that it is unlawful to discriminate against 'any individual' with respect to his employment. . . . The only exception to 'any individual' appears to be that contained in Section [2000e-1], i.e., aliens working outside the U.S. and to employees of certain religious and educational institutions.
>
> "Giving Section [2000e-1] its normal meaning would indicate a Congressional intent to exclude from the coverage of the statute aliens employed by covered employers working in the employers' operations outside of the United States.
>
> "The reason for such exclusions is obvious; employment conditions in foreign countries are beyond the control of Congress. The section does not similarly exempt from the provisions of the Act, U.S. Citizens employed abroad by U.S. employers. If Section [2000e-1] is to
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> [499 US 276]
>
> have any meaning at all, therefore, it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." Letter from W. Carey, EEOC General Counsel, to Senator Frank Church (Mar. 14, 1975), reprinted in App 48-49.

The agency has reiterated this interpretation in various decisions and policy pronouncements since then. See, e.g., EEOC Dec. No. 85-16 (Sept. 16, 1985), 38 FEP Cases 1889, 1891-1892; EEOC Policy Statement No. 125, supra, at 605:005 to 605:0057. "[I]t is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." EEOC v Commercial Office Products Co. 486 US 107, 115, 100 L Ed 2d 96, 108 S Ct 1666 (1988).

In this case, moreover, the EEOC's interpretation is reinforced by the long-standing interpretation of the Department of Justice, the agency with secondary enforcement responsibility under Title VII. See Sheet Metal Workers v EEOC, 478 US 421, 465-466, 92 L Ed 2d 344, 106 S Ct 3019 (1986) (plurality opinion) (deference owed Department of Justice interpretation of Title VII). Stating the position of the Department, then-Assistant Attorney General Scalia testified before Congress:

> "With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of 'unlawful employment practices' by any private employer 'engaged in any industry affecting commerce who has fifteen or more employees.' . . . Once again the [statute] contains an exemption 'with respect to the employment of aliens outside any State,' which implies that it is
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> [499 US 277]
>
> applicable to the employment of United States citizens by covered employers anywhere in the world." Foreign Investment and Arab Boycott Legislation, Hear-

ings before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong, 1st Sess, 165 (1975).

The majority offers no response to the view of the Department of Justice. It discounts the force of the EEOC's views on the ground that the EEOC has been inconsistent. The majority points to a 1970 EEOC regulation in which the agency declared that "Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin." 29 CFR § 1606.1(c) (1971). According to the majority, the inconsistency between § 1606.1(c) and the EEOC's 1975 pronouncement deprives the latter of persuasive force. See ante, at 257, 113 L Ed 2d, at 288.

This conclusion is based on a misreading of § 1606.1(c). Obviously, it does not follow from the EEOC's recognition that Title VII applies to "both citizens and noncitizens, domiciled or residing in the United States" that the agency understood Title VII to apply to *no one outside* the United States. The context of the regulation confirms that the EEOC meant no such thing. The agency promulgated § 1606.1 in order to announce its interpretation of Title VII's ban on national-origin discrimination. See §§ 1606.1(a)-(b), (d). The agency emphasized that Title VII "protects all individuals, both citizens and noncitizens, domiciled or residing in the United States" only to underscore that neither the citizenship nor the residency status of an individual affects this statutory prohibition. Indeed, the EEOC could not have stated that Title VII protects "both citizens *and* noncitizens" from national-origin discrimination *outside* the United States because such an interpretation would have been inconsistent with the alien-exemption provision. At the very time that

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§ 1606.1 was in effect, the EEOC was representing to Congress that Title VII did protect United States citizens from discrimination by United States employers abroad. See Letter from William A. Carey, EEOC General Counsel, supra, at 275-276, 113 L Ed 2d, at 300-301. The majority's insistence that the EEOC was contradicting itself fails to give the agency the deference that it is due on the interpretation of its own regulations. See Udall v Tallman, 380 US 1, 16-17, 13 L Ed 2d 616, 85 S Ct 792 (1965).

In sum, there is no reason not to give effect to the considered and consistently expressed views of the two agencies assigned to enforce Title VII.

IV

In the hands of the majority, the presumption against extraterritoriality is transformed from a "valid approach whereby unexpressed congressional intent may be ascertained," Foley Bros. 336 US, at 285, 93 L Ed 680, 69 S Ct 575, into a barrier to any genuine inquiry into the sources that reveal Congress' actual intentions. Because the language, history, and administrative interpretations of the statute all support application of Title VII to United States companies employing United States citizens abroad, I dissent.

[499 US 279]

ARIZONA, Petitioner

v

ORESTE C. FULMINANTE

499 US 279, 113 L Ed 2d 302, 111 S Ct 1246

[No. 89-839]

Argued October 10, 1990. Decided March 26, 1991.

Decision: Defendant's confession to informant in prison held coerced; admission of confession at Arizona capital murder trial held subject to harmless-error analysis, but not harmless under circumstances.

SUMMARY

After an individual's 11-year-old stepdaughter had been murdered in Arizona, the individual, who was a suspect in the killing, was incarcerated in a federal prison for an unrelated federal crime. Eventually, the individual confessed to the murder to a fellow inmate who was a paid informant for the Federal Bureau of Investigation, after the informant had (1) become friends with the individual; (2) said that he—the informant—knew that the individual was starting to get some "tough treatment" from other inmates because of a rumor that the individual was suspected of the murder; and (3) offered to protect the individual from his fellow inmates. Prior to the individual's capital trial in the Superior Court, Maricopa County, Arizona, on a charge of first-degree murder, the individual, claiming that there had been a violation of his alleged rights to due process under the Federal Constitution's Fifth and Fourteenth Amendments, moved to suppress (1) his first confession to the informant; and (2) a second confession to a woman who eventually became the informant's wife. The trial court, however, in denying the motion to suppress, specifically found that both confessions had been voluntary. The state introduced both confessions as evidence at trial, and the individual was convicted of murder and sentenced to death. On appeal, the Arizona Supreme Court (1) initially affirmed, as the court expressed the view, with respect to the two confessions, that (a) even though the first confession had been coerced, the admission of the first confession at trial had been harmless error, and (b) the second confession had not been inadmissible as a "fruit of the poisonous tree"; but (2) upon the individual's

SUBJECT OF ANNOTATION

Beginning on page 757, infra

Prejudicial effect of admitting at criminal trial evidence of confession or other self-incriminating statement obtained from accused in violation of Federal Constitution—Supreme Court cases

Briefs of Counsel, p 755, infra.

motion for reconsideration, reversed the individual's conviction and ordered that the individual be retried without the use of the first confession, on the ground that harmless-error analysis was inapplicable to coerced confessions (161 Ariz 237, 778 P2d 602).

On certiorari, the United States Supreme Court affirmed. It was held, with different majorities of the Justices for each holding, that (1) the individual's first confession had been coerced; (2) the admission at a state criminal trial, in violation of the Fourteenth Amendment's due process clause, of a defendant's involuntary confession is subject to harmless-error analysis; and (3) the admission of the individual's first confession was not harmless under the particular circumstances.

In those portions of the opinion of WHITE, J., which constituted the opinion of the court, it was held in pertinent part (1) in a portion (Part II) joined by MARSHALL, BLACKMUN, STEVENS, and SCALIA, JJ., that for purposes of the Fourteenth Amendment's due process clause, the individual's will had been overborne in such a way as to render his first confession the product of coercion—that is, an involuntary confession—where (a) the parties agreed that the informant had acted as an agent of the government when the informant had questioned the individual, (b) the Arizona Supreme Court's finding would be accepted that there had been a credible threat of physical violence, absent protection from the informant, unless the individual confessed, and (c) additional facts supported the finding of coercion, with respect to (i) the individual's intelligence, physical build, and problems in adapting to prison life, and (ii) the informant's position as the individual's friend; and (2) in a portion (Part IV) joined by MARSHALL, BLACKMUN, STEVENS, and KENNEDY, JJ., that the admission of the individual's first confession was not harmless beyond a reasonable doubt under the particular circumstances, even though the individual's second confession had also been admitted, because (a) both the trial court and the state had recognized that a successful prosecution depended on the jury's believing the two confessions, (b) the jury's assessment of the second confession could easily have depended in large part on the presence of the first confession, (c) the admission of the first confession had led to the admission of other evidence prejudicial to the individual, and (d) the presence of the first confession had influenced the trial's capital sentencing phase. Also, WHITE, J., in a dissenting portion (Part III) joined by MARSHALL, BLACKMUN, and STEVENS, JJ., expressed the view that the admission of a defendant's coerced confession against the defendant at the defendant's criminal trial, in violation of the defendant's federal constitutional rights, should not be subject to harmless-error analysis, because (1) a coerced confession is fundamentally different from the other types of erroneously admitted evidence to which harmless-error analysis has been applied; and (2) no convincing reason had been offered for overturning the United States Supreme Court's long line of decisions requiring the exclusion of coerced confessions.

In that portion (Part II) of the opinion of REHNQUIST, Ch. J., which constituted the opinion of the court, it was held by REHNQUIST, Ch. J., joined by O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., that the admission at a

state criminal trial, in violation of the Fourteenth Amendment's due process clause, of a defendant's involuntary—that is, coerced—confession is subject to harmless-error analysis, because (1) the contrary conclusion is not required by the principle of stare decisis; (2) involuntary statements or confessions belong in the category of "trial error," similar in degree and kind to the erroneous admission of other types of evidence; (3) the admission of an involuntary confession is not the type of error which transcends the criminal process; and (4) the possibly dramatic effect of an involuntary confession's admission on the course of a trial is not a reason for eschewing the harmless-error test entirely. Also, REHNQUIST, Ch. J., expressed the dissenting view in pertinent part (1) in a portion (Part I) joined by O'CONNOR, KENNEDY, and SOUTER, JJ., that, under the court's duty to examine the record independently to decide the federal question of voluntariness, the facts of record in the case at hand were different from the facts which had been present in prior cases in which confessions had been found to be coerced and involuntary; and (2) in a portion (Part III) joined by O'CONNOR and SCALIA, JJ., that the case at hand was a "classic case" of harmless error, where a second confession giving more details of the crime than the first confession had been (a) admitted into evidence, and (b) found to be free of any constitutional objection.

KENNEDY, J., concurring in the judgment, expressed the view that (1) for the reasons stated by REHNQUIST, Ch. J., (a) the individual's first confession had not been coerced, and (b) harmless-error analysis should apply in a case of a coerced confession; but (2) for the reasons given by WHITE, J., the admission of the individual's first confession could not with confidence be found to be harmless error; and (3) given that the view that the first confession had not been coerced did not command a majority, it was proper, in the interest of providing a clear mandate to the Arizona Supreme Court in the capital case at hand, to accept in the case at hand the holding of five Justices that the first confession had been coerced and was inadmissible.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

5 Am Jur 2d, Appeal and Error §§ 777-779, 791, 797-807; 21A Am Jur 2d, Criminal Law § 709; 29 Am Jur 2d, Evidence §§ 529, 542, 566, 568, 571-573, 575

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:876, 22:878, 22:1275-22:1277; 12A Federal Procedure, L Ed, Evidence § 33:656

22 Am Jur Proof of Facts 2d 539, Involuntary Confession: Psychological Coercion

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence

USCS, Constitution, Amendment 14

L Ed Digest, Appeal § 1562; Constitutional Law § 840.5

L Ed Index, Confessions; Duress or Coercion; Exclusion or Suppression of Evidence; Harmless or Prejudicial Error; Informers

Index to Annotations, Confessions and Admissions; Duress and Coercion; Exclusion and Suppression of Evidence; Harmless and Prejudicial Error; Informers

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L Ed 2d 947.

Validity or admissibility, under Federal Constitution, of accused's pretrial confession as affected by accused's mental illness or impairment at time of confession—Supreme Court cases. 93 L Ed 2d 1078.

Comment note.—Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L Ed 2d 921.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 1 L Ed 2d 1735, 4 L Ed 2d 1833, 12 L Ed 2d 1340, 16 L Ed 2d 1294, 22 L Ed 2d 872.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 840.5 — due process — confession of accused to informant — coercion

1a-1f. A state criminal defendant's pretrial, murder confession, while in prison on an unrelated federal charge, to a fellow inmate who is a paid informant for the Federal Bureau of Investigation, is coerced—that is, involuntary—for purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, because the defendant's will is overborne in such a way as to render the confession the product of coercion, where (1) the parties agree that the informant acted as an agent of the government when the informant questioned the defendant about the murder and elicited the confession; (2) the finding is accepted that there was a credible threat of physical violence, absent protection from the informant, unless the defendant confessed; and (3) additional facts support a finding of coercion, namely, that (a) the defendant, who possesses low-average to average intelligence, dropped out of school in the fourth grade, (b) the defendant is short in stature and slight in build, (c) although the defendant had been in prison before, the defendant had not always adapted well to the stress of prison life, and (d) the informant's position as the defendant's friend may well have made the defendant particularly susceptible to the informant's entreaties. (Rehnquist, Ch. J., and O'Connor, Kennedy, and Souter, JJ., dissented from this holding.)

Appeal § 806.5 — acceptance of findings by state court — threat to accused — voluntariness of confession

2a, 2b. On certiorari to review a state appellate court's reversal of a defendant's conviction for the murder of his 11-year-old stepdaughter, the United States Supreme Court will accept, as permissible on the record, the state appellate court's finding that there was a credible threat of physical violence with respect to a pretrial confession by the defendant, while in prison on an unrelated federal charge, to a fellow inmate who was a paid informant of the Federal Bureau of Investigation, where the state appellate court—in applying a totality of the circumstances test to determine that the confession had been coerced—noted that (1) because the defendant was an alleged child murderer, the defendant had been in danger of physical harm at the hands of other inmates; (2) the informant had been aware that the defendant had been receiving "rough treatment from the guys"; (3) the informant, using his knowledge of those threats, had offered to protect the defendant in exchange for a confession to the stepdaughter's murder; and (4) in response to the informant's offer of protection, the defendant had confessed. (Rehnquist, Ch. J., and O'Connor, Kennedy, and Souter, JJ., dissented from this holding.)

Appeal § 806.5 — review of state court — confession of accused

3. On certiorari to review a state court's decision as to the voluntariness of a state criminal defendant's confession, the United States Supreme Court normally gives great deference to the factual findings of the state court, but the ultimate issue of voluntariness is a legal question requiring independent federal determination.

Constitutional Law § 840.5 — due process — confession of accused

4. For purposes of determining, under the due process clause of the Federal Constitution's Fourteenth Amendment, whether a state criminal defendant's confession has been coerced, (1) a finding of coercion need not depend upon actual violence by a government agent; (2) a credible threat is sufficient; (3) coercion can be mental as well as physical; and (4) the blood of the accused is not the only hallmark of an unconstitutional inquisition.

Appeal § 1562 — state capital murder trial — harmless error — admission of coerced confession

5a-5g. With respect to a defendant's first, pretrial, murder confession, while in prison on an unrelated federal charge, to a fellow inmate who was a paid informant of the Federal Bureau of Investigation—assuming that (1) the confession was coerced, and (2) harmless-error analysis applies to the admission, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, of a defendant's coerced confession at a state criminal trial—the admission of the first confession at the defendant's state capital murder trial is not harmless error beyond a reasonable doubt, even though there was also admitted at trial the defendant's second confession to a woman who eventually became the informant's wife, because (1) both the trial court and the state recognized that a successful prosecution depended on the jury's believing the two confessions; (2) the jury's assessment of the second confession could easily have depended in large part on the presence of the first confession, where (a) absent the admission of the first confession, the jurors might not have believed the woman's story of the circumstances of the second confession, (b) even though each confession was easily impeachable if viewed in isolation, the jury might have believed that the two confessions reinforced and corroborated each other, so that one confession was not merely cumulative of the other, and (c) the jurors could have believed that the woman had a motive to lie about the second confession in order to assist her informant-husband and to obtain her own favorable treatment; (3) the admission of the first confession led to the admission of other evidence prejudicial to the defendant—such as the state's introduction of evidence that the defendant knew of the informant's connections with organized crime—as an attempt by the state to explain why the defendant would have been motivated to confess to the informant in seeking protection; (4) although the concern is with the effect on the defendant's conviction, the presence of the confession also influenced the trial's sentencing phase, in which the trial judge sentenced the defendant to death based upon the single aggravating circumstance that the murder was committed in "an especially heinous, cruel, and depraved manner," where (a) the judge relied heavily on certain evidence—concerning the manner of the killing and the defendant's motives and state of mind—which evidence could be found in only the two confessions, (b) although the judge might have reached the same conclusions without the first confession, it is impossible to say so beyond a reasonable doubt, (c) the judge's assessment of

the woman's credibility, and hence the reliability of the second confession, might well have been influenced by the corroborative effect of the erroneously admitted first confession, and (d) under such circumstances, it is possible that either confession alone, even when considered with all the other evidence, would have been insufficient to permit the judge to find a requisite aggravating circumstance beyond a reasonable doubt. (Rehnquist, Ch. J., and O'Connor and Scalia, JJ., dissented from this holding.)

[See annotation p 757, infra]

Appeal §§ 1673, 1689 — order for new trial — affirmance

6a, 6b. On certiorari to review a state appellate court's reversal of a defendant's conviction in a state capital murder trial at which a confession of the defendant was introduced into evidence, the United States Supreme Court will affirm the state appellate court's judgment, because the Supreme Court agrees with the state appellate court's conclusion that the defendant is entitled to a new trial at which the confession is not admitted, where (1) the state appellate court, in ordering a new trial, ruled that (a) the defendant's confession had been coerced, and (b) harmless-error analysis was inapplicable to coerced confessions; and (2) the Supreme Court determines, with different majorities of the Justices for each point, that (a) the defendant's confession had been coerced, (b) harmless-error analysis applies to the admission, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, of a defendant's coerced confession at the defendant's state criminal trial, and (c) the admission of the confession in question was not harmless beyond a reasonable doubt under the particular circumstances of the case at hand. (Rehnquist, Ch. J., and O'Connor and Scalia, JJ., dissented from this holding.)

Appeal § 1514 — harmless error — test

7. Before a federal constitutional error can be held harmless, a court must be able to declare a belief that the error was harmless beyond a reasonable doubt; the United States Supreme Court, on certiorari, has the power to review the record de novo in order to determine an error's harmlessness.

Appeal § 1297 — burden of proof — harmless error — admission of confession

8. Assuming that harmless-error analysis applies to the admission at a state criminal trial, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, of a defendant's coerced confession, the United States Supreme Court, on certiorari, must determine whether the state has met its burden of demonstrating that the admission of the confession did not contribute to the defendant's conviction.

Appeal § 1562 — harmless error — admission of coerced confession

9. Assuming that harmless-error analysis applies to the admission at a defendant's state criminal trial, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, of a full but coerced confession in which the defendant discloses the motive for and means of the crime, the risk that such a confession is unreliable, coupled with the profound impact that a confession has upon the jury, requires a reviewing court to exercise

extreme caution before determining that the confession's admission was harmless, because (1) a defendant's own confession is probably the most probative and damaging evidence that can be admitted against him; and (2) while some statements by a defendant may concern isolated aspects of a crime or may be incriminating only when linked to other evidence, such a full confession may tempt the jury to rely upon that evidence alone in reaching a decision.

[See annotation p 757, infra]

Appeal § 1662 — effect of decision on other grounds

10a, 10b. On certiorari to review a state appellate court's decision with respect to a state criminal trial in which a confession of the defendant had been admitted, even though the defendant argues that certain other prejudicial evidence would not have been admitted if the confession had been excluded from trial, the United States Supreme Court will express no opinion as to the effect that any such other evidence might have had on the defendant's conviction, where the Supreme Court finds that the admission of the confession was not harmless error in any event.

Appeal § 1514 — harmless error — applicability

11a, 11b. The common thread connecting the cases in which the United States Supreme Court has applied harmless-error analysis to a wide range of federal constitutional errors—so that such an error does not automatically require reversal of a criminal defendant's conviction—is that each such case involves "trial error," that is, error which (1) occurred during the presentation of the case to the jury, and (2) may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether the evidence's admission was harmless beyond a reasonable doubt; such a harmless-error doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error; there are, however, other federal constitutional violations which are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards. (White, Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

Appeal §§ 1562, 1622 — harmless error — admission of coerced confession

12a-12c. The admission at a state criminal trial, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, of a defendant's involuntary—that is, coerced—confession is subject to harmless-error analysis, because (1) the contrary conclusion is not required by the principle of stare decisis; (2) involuntary statements or confessions belong in the category of "trial error," similar in degree and kind to the erroneous admission of other types of evidence, where (a) the evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of (i) a confession obtained in violation of the Constitution's Sixth Amendment, (ii) evidence seized in violation of the Constitution's Fourth Amendment, or (iii) a prosecutor's improper comment on a defendant's silence at

trial in violation of the Constitution's Fifth Amendment, and (b) when reviewing the erroneous admission of an involuntary confession, an appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt; (3) the admission of an involuntary confession is not the type of error which transcends the criminal process, where the Supreme Court has applied harmless-error analysis to the violation of other federal constitutional rights similar in magnitude and importance and involving the same level of police misconduct, such as the admission of a defendant's statements obtained in violation of the Sixth Amendment; and (4) even though an involuntary confession's admission may have a more dramatic effect on the course of a trial than other trial errors, such an effect (a) means that a reviewing court will conclude in such a case that the confession's admission was not harmless error, but (b) is not a reason for eschewing the harmless-error test entirely. (White, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

[See annotation p 757, infra]

Courts §§ 767, 768 — stare decisis — limitation of authority — dicta

13. Even though a 1967 United States Supreme Court case's discussion on what errors may not be subject to harmless-error analysis cited a 1958 Supreme Court case as making a negative reference with respect to coerced confessions, the principle of stare decisis does not require the Supreme Court, in 1991, to hold that harmless-error analysis is inapplicable to the admission at a state criminal trial, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, of a defendant's involuntary—that is, coerced—confession, because (1) the 1967 case's use of the language "prior cases have indicated," coupled with the relegation to a footnote of the prior cases including the 1958 case, is more appropriately regarded as a historical reference to the holdings of the prior cases; and (2) the argument rejected by the Supreme Court in the 1958 case was not the harmless-error analysis generally adopted in the 1967 case, but was a much more lenient rule which would have made the admission of an involuntary confession virtually risk-free for the state. (White, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Appeal §§ 1513, 1514, 1535, 1625; Civil Rights § 8; Criminal Law §§ 46, 46.3, 47.5; Judges § 10 — right to counsel — impartial judge — racial exclusion from grand jury — self-representation — public trial — harmless error

14. With respect to a criminal trial, the federal constitutional violations which are not subject to harmless-error analysis include (1) certain categories with respect to which the entire conduct of the trial from beginning to end is affected, namely (a) a total deprivation of the right to counsel at trial, and (b) the presence on the bench of a judge who is not impartial, and (2) other categories consisting of similar structural defects affecting the framework within which the trial proceeds—rather than simply errors in the trial pro-

cess itself—namely (a) the unlawful exclusion of members of the defendant's race from a grand jury, (b) a deprivation of the right to self-representation at trial, and (c) a deprivation of the right to public trial; without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

SYLLABUS BY REPORTER OF DECISIONS

After respondent Fulminante's 11-year-old stepdaughter was murdered in Arizona, he left the State, was convicted of an unrelated federal crime, and was incarcerated in a federal prison in New York. There he was befriended by Anthony Sarivola, a fellow inmate who was a paid informant for the Federal Bureau of Investigation and was masquerading as an organized crime figure. When Sarivola told Fulminante that he knew Fulminante was getting tough treatment from other inmates because of a rumor that he was a child murderer, and offered him protection in exchange for the truth, Fulminante admitted that he had killed the girl and provided details about the crime. After Fulminante was released from prison, he also confessed to Sarivola's wife, whom he had never met before. Subsequently, he was indicted in Arizona for first-degree murder. The trial court denied his motion to suppress, inter alia, the confession to Sarivola, rejecting his contention that it was coerced and thus barred by the Fifth and Fourteenth Amendments. He was convicted and sentenced to death. The State Supreme Court held that the confession was coerced and that this Court's precedent precluded the use of harmless-error analysis in such a case. It remanded the case for a new trial without the use of the confession.

Held: The judgment is affirmed.

161 Ariz 237, 778 P2d 602, affirmed.

Justice White delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1. The State Supreme Court properly concluded that Fulminante's confession was coerced. The court applied the appropriate test, totality of the circumstances, cf. Schneckloth v Bustamonte, 412 US 218, 226, 36 L Ed 2d 854, 93 S Ct 2041, to determine the confession's voluntariness and plainly found that Fulminante was motivated to confess by a fear of physical violence, absent protection from his friend Sarivola. The court's finding, permissible on this record, that there was a credible threat of physical violence is sufficient to support a finding of coercion. Blackburn v Alabama, 361 US 199, 206, 4 L Ed 2d 242, 80 S Ct 274.

2. Under harmless-error analysis, which the Court has determined applies to the admission of coerced confessions, post, at 306-312, 113 L Ed 2d, at 329-333, the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Sarivola was harmless.

(a) A defendant's confession is like no other evidence. It is probably the most probative and damaging evidence that can be admitted against him, and, if it is a full confession, a jury may be tempted to rely on it alone in reaching its decision. The risk that a coerced confession is unreliable, coupled with the profound impact that it has upon the jury,

requires a reviewing court to exercise extreme caution before determining that the confession's admission was harmless.

(b) The evidence shows that the State has failed to meet its burden. First, the transcript reveals that both the trial court and the State recognized that a successful prosecution depended on the jury believing both confessions, since it is unlikely that the physical and circumstantial evidence alone would have been sufficient to convict. Second, the jury's assessment of the second confession could easily have depended on the presence of the first. The jury might have believed that the two confessions reinforced and corroborated each other, since the only evidence corroborating some aspects of the second confession was in the first confession. Without that confession, the jurors might have found the wife's story unbelievable because the second confession was given under questionable circumstances, and they might have believed that she was motivated to lie in order to receive favorable treatment from federal authorities for herself and her husband. Third, the admission of the first confession led to the admission of evidence about Sarivola's organized crime connections, which depicted Fulminante as someone who willingly sought out the company of criminals and, thus, was prejudicial to him. Finally, it is impossible to say beyond a reasonable doubt that the judge, who, during the sentencing phase, relied on evidence that could only be found in the two confessions, would have passed the same sentence without the confession.

The Chief Justice delivered the opinion of the Court with respect to Part II, concluding that the harmless-error rule adopted in Chapman v California, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, is applicable to the admission of involuntary confessions. The admission of such a confession is a "trial error," which occurs during a case's presentation to the trier of fact and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission is harmless beyond a reasonable doubt. See, e.g., Clemons v Mississippi, 494 US 738, 108 L Ed 2d 725, 110 S Ct 1441. A trial error differs markedly from violations that are structural defects in the constitution of the trial mechanism and thus defy analysis by harmless-error standards. Gideon v Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733; Tumey v Ohio, 273 US 510, 71 L Ed 749, 47 S Ct 437, 50 ALR 1243, distinguished. It is also not the type of error that transcends the criminal process. In fact, it is impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment, whose admission is subject to harmless-error analysis, see, e.g., Milton v Wainwright, 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174, and those elicited in violation of the Fourteenth Amendment, since both confessions have the same evidentiary impact and may have been elicited by equally egregious conduct.

White, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. Marshall, Blackmun, and Stevens, JJ., joined Parts I, II, III, and IV of that opinion; Scalia, J., joined Parts I and II; and Kennedy, J., joined Parts I and IV.

Rehnquist, C. J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III. O'Connor, J., joined Parts I, II, and III of that opinion; Kennedy and Souter, JJ., joined Parts I and II; and Scalia, J., joined Parts II and III. Kennedy, J., filed an opinion concurring in the judgment.

APPEARANCES OF COUNSEL

Barbara M. Jarrett argued the cause for petitioner.

Paul J. Larkin argued the cause for the United States, as amicus curiae, in support of petitioner, by special leave of court.

Stephen R. Collins argued the cause for respondent.

Briefs of Counsel, p 755, infra.

OPINION OF THE COURT

[499 US 282]

Justice **White** delivered an opinion, Parts I, II, and IV of which are the opinion of the Court, and Part III of which is a dissenting opinion.†

The Arizona Supreme Court ruled in this case that respondent Oreste Fulminante's confession, received in evidence at his trial for murder, had been coerced and that its use against him was barred by the Fifth and Fourteenth Amendments to the United States Constitution. The court also held that the harmless-error rule could not be used to save the conviction. We affirm the judgment of the Arizona court, although for different reasons than those upon which that court relied.

I

Early in the morning of September 14, 1982, Fulminante called the Mesa, Arizona, Police Department to report that his 11-year-old stepdaughter, Jeneane Michelle Hunt, was missing. He had been caring for Jeneane while his wife, Jeneane's mother, was in the hospital. Two days later, Jeneane's body was found in the desert east of Mesa. She had been shot twice in the head at close range with a large caliber weapon, and a ligature was around her neck. Because of the decomposed condition of the body, it was impossible to tell whether she had been sexually assaulted.

Fulminante's statements to police concerning Jeneane's disappearance and his relationship with her contained a number of inconsistencies, and he became a suspect in her killing. When no charges were filed against him, Fulminante left Arizona for New Jersey. Fulminante was later convicted in New Jersey on federal charges of possession of a firearm by a felon.

Fulminante was incarcerated in the Ray Brook Federal Correctional Institution in New York. There he became

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friends with another inmate, Anthony Sarivola, then serving a 60-day sentence for extortion. The two men came to spend several hours a day together. Sarivola, a former police officer, had been involved in loansharking for organized crime but then became a paid informant for the Federal Bureau of Investigation. While at Ray Brook, he masqueraded as an organized crime figure. After becoming friends with Fulminante, Sarivola heard a rumor that Fulminante was suspected of killing a child in Arizona. Sarivola then raised the subject with Fulminante in several conversations, but Fulminante repeatedly denied any

† Justice Marshall, Justice Blackmun, and Justice Stevens join this opinion in its entirety; Justice Scalia joins Parts I and II; and Justice Kennedy joins Parts I and IV.

involvement in Jeneane's death. During one conversation, he told Sarivola that Jeneane had been killed by bikers looking for drugs; on another occasion, he said he did not know what had happened. Sarivola passed this information on to an agent of the Federal Bureau of Investigation, who instructed Sarivola to find out more.

Sarivola learned more one evening in October 1983, as he and Fulminante walked together around the prison track. Sarivola said that he knew Fulminante was "starting to get some tough treatment and whatnot" from other inmates because of the rumor. App 83. Sarivola offered to protect Fulminante from his fellow inmates, but told him, " 'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.' " Ibid. Fulminante then admitted to Sarivola that he had driven Jeneane to the desert on his motorcycle, where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head. Id., at 84-85.

Sarivola was released from prison in November 1983. Fulminante was released the following May, only to be arrested the next month for another weapons violation. On September 4, 1984, Fulminante was indicted in Arizona for the first-degree murder of Jeneane.

Prior to trial, Fulminante moved to suppress the statement he had given Sarivola in prison, as well as a second confession

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he had given to Donna Sarivola, then Anthony Sarivola's fiancée and later his wife, following his May 1984 release from prison. He asserted that the confession to Sarivola was coerced, and that the second confession was the "fruit" of the first. Id., at 6-8. Following the hearing, the trial court denied the motion to suppress, specifically finding that, based on the stipulated facts, the confessions were voluntary. Id., at 44, 63. The State introduced both confessions as evidence at trial, and on December 19, 1985, Fulminante was convicted of Jeneane's murder. He was subsequently sentenced to death.

Fulminante appealed, arguing, among other things, that his confession to Sarivola was the product of coercion and that its admission at trial violated his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. After considering the evidence at trial as well as the stipulated facts before the trial court on the motion to suppress, the Arizona Supreme Court held that the confession was coerced, but initially determined that the admission of the confession at trial was harmless error, because of the overwhelming nature of the evidence against Fulminante. 161 Ariz 237, 778 P2d 602 (1988). Upon Fulminante's motion for reconsideration, however, the court ruled that this Court's precedent precluded the use of the harmless-error analysis in the case of a coerced confession. Id., at 262, 778 P2d, at 627. The court therefore reversed the conviction and ordered that Fulminante be retried without the use of the confession to Sarivola.[1] Because of differing

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views in

1. In its initial opinion, the Arizona Supreme Court had determined that the second confession, to Donna Sarivola, was not the "fruit of the poisonous tree," because it was made six months after the confession to Sarivola; it occurred after Fulminante's need for

the state and federal courts over whether the admission at trial of a coerced confession is subject to a harmless-error analysis, we granted the State's petition for certiorari, 494 US 1055, 108 L Ed 2d 762, 110 S Ct 1522 (1990). Although a majority of this Court finds that such a confession is subject to a harmless-error analysis, for the reasons set forth below, we affirm the judgment of the Arizona court.

II

[1a] We deal first with the State's contention that the court below erred in holding Fulminante's confession to have been coerced. The State argues that it is the totality of the circumstances that determines whether Fulminante's confession was coerced, cf. Schneckloth v Bustamonte, 412 US 218, 226, 36 L Ed 2d 854, 93 S Ct 2041 (1973), but contends that rather than apply this standard, the Arizona court applied a "but for" test, under which the court found that but for the promise given by Sarivola, Fulminante would not have confessed. Brief for Petitioner 14-15. In support of this argument, the State points to the Arizona court's reference to Bram v United States, 168 US 532, 42 L Ed 568, 18 S Ct 183 (1897). Although the Court noted in Bram that a confession cannot be obtained by "'any direct or implied promises, however slight, nor by the exertion of any improper influence,'" id., at 542-543, 42 L Ed 568, 18 S Ct 183 (quoting 3 H. Smith & A. Keep, Russell on Crimes and Misdemeanors 478 (6th ed 1896)), it is clear that this passage from Bram, which under current precedent does not state the standard for determining the voluntariness of a confession, was not relied on by the Arizona court in reaching its conclusion. Rather, the court cited this language as part of a longer quotation from an Arizona case which accurately described the State's burden of proof for establishing voluntariness. See 161 Ariz, at 244, 778 P2d, at 609 (citing State v Thomas, 148 Ariz 225, 227, 714 P2d 395, 397 (1986); Malloy v Hogan, 378 US 1, 7, 12 L Ed 2d 653, 84 S Ct 1489 (1964); and Bram, 168 US, at 542-543, 42 L Ed 568, 18 S Ct 183). Indeed, the Arizona Supreme Court stated that a "determination regarding

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the voluntariness of a confession . . . must be viewed in a totality of the circumstances," 161 Ariz, at 243, 778 P2d, at 608, and under that standard plainly found that Fulminante's statement to Sarivola had been coerced.

[1b, 2a] In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, the Arizona Supreme Court focused on a number of relevant facts. First, the court noted that "because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates." Ibid. In addition, Sarivola was aware that Fulminante had been receiving "'rough treatment from the guys.'" Id., at 244, n 1, 778 P2d, at 609, n 1. Using his knowledge of these threats, Sarivola offered to protect Fulminante in ex-

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protection from Sarivola presumably had ended; and it took place in the course of a casual conversation with someone who was not an agent of the State. 161 Ariz 237, 246, 778 P2d 602, 611 (1988). The court adhered to this determination in its supplemental opinion. Id., at 262, 778 P2d, at 627. This aspect of the Arizona Supreme Court's decision is not challenged here.

change for a confession to Jeneane's murder, id., at 243, 778 P2d, at 608, and "[i]n response to Sarivola's offer of protection, [Fulminante] confessed." Id., at 244, 778 P2d, at 609. Agreeing with Fulminante that "Sarivola's promise was 'extremely coercive,' " id., at 243, 778 P2d, at 608, the Arizona Court declared: "[T]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word." Id., at 262, 778 P2d, at 627.[2]

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[3] We normally give great deference to the factual findings of the state court. Davis v North Carolina, 384 US 737, 741, 16 L Ed 2d 895, 86 S Ct 1761 (1966); Haynes v Washington, 373 US 503, 515, 10 L Ed 2d 513, 83 S Ct 1336 (1963); Culombe v Connecticut, 367 US 568, 603-604, 6 L Ed 2d 1037, 81 S Ct 1860 (1961). Nevertheless, "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." Miller v Fenton, 474 US 104, 110, 88 L Ed 2d 405, 106 S Ct 445 (1985). See also Mincey v Arizona, 437 US 385, 398, 57 L Ed 2d 290, 98 S Ct 2408 (1978); Davis, supra, at 741-742, 16 L Ed 2d 895, 86 S Ct 1761; Haynes, supra, at 515, 10 L Ed 2d 513, 83 S Ct 1336; Chambers v Florida, 309 US 227, 228-229, 84 L Ed 716, 60 S Ct 472 (1940).

[1d, 2b, 4] Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced.[3] The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent;[4] a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v Alabama, 361 US 199,

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2. **[1c]** There are additional facts in the record, not relied upon by the Arizona Supreme Court, which also support a finding of coercion. Fulminante possesses low average to average intelligence; he dropped out of school in the fourth grade. Record 88i, 88o. He is short in stature and slight in build. Id., at 88. Although he had been in prison before, ibid., he had not always adapted well to the stress of prison life. While incarcerated at the age of 26, he had "felt threatened by the [prison] population," id., at 88x, and he therefore requested that he be placed in protective custody. Once there, however, he was unable to cope with the isolation and was admitted to a psychiatric hospital. Id., at 88t-88b1. The Court has previously recognized that factors such as these are relevant in determining whether a defendant's will has been overborne. See, e. g., Payne v Arkansas, 356 US 560, 567, 2 L Ed 2d 975, 78 S Ct 844 (1958) (lack of education); Reck v Pate, 367 US 433, 441, 6 L Ed 2d 948, 81 S Ct 1541 (1961) (low intelligence). Cf. Schneckloth v Bustamonte, 412 US 218, 226, 36 L Ed 2d 854, 93 S Ct 2041 (1973) (listing potential factors); Culombe v Connecticut, 367 US 568, 602, 6 L Ed 2d 1037, 81 S Ct 1860 (1961) (same). In addition, we note that Sarivola's position as Fulminante's friend might well have made the latter particularly susceptible to the former's entreaties. See Spano v New York, 360 US 315, 323, 3 L Ed 2d 1265, 79 S Ct 1202 (1959).

3. **[1e]** Our prior cases have used the terms "coerced confession" and "involuntary confession" interchangeably "by way of convenient shorthand." Blackburn v Alabama, 361 US 199, 207, 4 L Ed 2d 242, 80 S Ct 274 (1960). We use the former term throughout this opinion, as that is the term used by the Arizona Supreme Court.

4. **[1f]** The parties agree that Sarivola acted as an agent of the Government when he questioned Fulminante about the murder and elicited the confession. Brief for Petitioner 19; Brief for Respondent 2.

206, 4 L Ed 2d 242, 80 S Ct 274 (1960). See also Culombe, supra, at 584, 6 L Ed 2d 1037, 81 S Ct 1860; Reck v Pate, 367 US 433, 440-441, 6 L Ed 2d 948, 81 S Ct 1541 (1961); Rogers v Richmond, 365 US 534, 540, 5 L Ed 2d 760, 81 S Ct 735 (1961); Payne v Arkansas, 356 US 560, 561, 2 L Ed 2d 975, 78 S Ct 844

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(1958); Watts v Indiana, 338 US 49, 52, 93 L Ed 1801, 69 S Ct 1347 (1949). As in Payne, where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 US, at 564-565, 567, 2 L Ed 2d 975, 78 S Ct 844, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion.

III

Four of us, Justices Marshall, Blackmun, Stevens, and myself, would affirm the judgment of the Arizona Supreme Court on the ground that the harmless-error rule is inapplicable to erroneously admitted coerced confessions. We thus disagree with the Justices who have a contrary view.

The majority today abandons what until now the Court has regarded as the "axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v Richmond, 365 US 534 [5 L Ed 760, 81 S Ct 735 (1961)], and even though there is ample evidence aside from the confession to support the conviction. Malinski v New York, 324 US 401 [89 L Ed 1029, 65 S Ct 781 (1945)]; Stroble v California, 343 US 181 [96 L Ed 872, 72 S Ct 599 (1952)]; Payne v Arkansas, 356 US 560 [2 L Ed 2d 975, 78 S Ct 844]." Jackson v Denno, 378 US 368, 376, 12 L Ed 2d 908, 84 S Ct 1774, 1 ALR3d 1205 (1964). The Court has repeatedly stressed that the view that the admission of a coerced confession can be harmless error because of the other evidence to support the verdict is "an impermissible doctrine," Lynumn v Illinois, 372 US 528, 537, 9 L Ed 2d 922, 83 S Ct 917 (1963); for "the admission in evidence,

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over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment," Payne, supra, at 568, 2 L Ed 2d 975, 78 S Ct 844. See also Rose v Clark, 478 US 570, 578, n 6, 92 L Ed 2d 460, 106 S Ct 3101 (1986); New Jersey v Portash, 440 US 450, 459, 59 L Ed 2d 501, 99 S Ct 1292 (1979); Lego v Twomey, 404 US 477, 483, 30 L Ed 2d 618, 92 S Ct 619 (1972); Chapman v California, 386 US 18, 23, and n 8, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065 (1967); Haynes v Washington, supra, at 518, 10 L Ed 2d 513, 83 S Ct 1336; Blackburn v Alabama, supra, at 206, 4 L Ed 2d 242, 80 S Ct 274; Spano v New York, 360 US 315, 324, 3 L Ed 2d 1265, 79 S Ct 1202 (1959); Brown v Allen, 344 US 443, 475, 97 L Ed 469,

73 S Ct 397 (1953); Stroble v California, 343 US 181, 190, 96 L Ed 872, 72 S Ct 599 (1952); Gallegos v Nebraska, 342 US 55, 63, 96 L Ed 86, 72 S Ct 141 (1951); Haley v Ohio, 332 US 596, 599, 92 L Ed 224, 68 S Ct 302 (1948); Malinski v New York, 324 US 401, 404, 89 L Ed 1029, 65 S Ct 781 (1945); Lyons v Oklahoma, 322 US 596, 597, n 1, 88 L Ed 1481, 64 S Ct 1208 (1944). As the decisions in Haynes and Payne, supra, show, the rule was the same even when another confession of the defendant had been properly admitted into evidence. Today, a majority of the Court, without any justification, cf. Arizona v Rumsey, 467 US 203, 212, 81 L Ed 2d 164, 104 S Ct 2305 (1984), overrules this vast body of precedent without a word and in so doing dislodges one of the fundamental tenets of our criminal justice system.

In extending to coerced confessions the harmless-error rule of Chapman v California, supra, the majority declares that because the Court has applied that analysis to numerous other "trial errors," there is no reason that it should not apply to an error of this nature as well. The four of us remain convinced, however, that we should abide by our cases that have refused to apply the harmless-error rule to coerced confessions, for a coerced confession is fundamentally different from other types of erroneously admitted evidence to which the rule has been applied. Indeed, as the majority concedes, Chapman itself recognized that prior cases "have indicated that there are some constitutional rights so basic to a fair trial that their infraction can *never* be treated as harmless error," and it placed in that category the constitutional rule against using a defendant's coerced confession against

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him at his criminal trial. 386 US, at 23, and n 8, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065 (emphasis added). Moreover, cases since Chapman have reiterated the rule that using a defendant's coerced confession against him is a denial of due process of law regardless of the other evidence in the record aside from the confession. Lego v Twomey, supra, at 483, 30 L Ed 2d 618, 92 S Ct 619; Mincey v Arizona, 437 US, at 398, 57 L Ed 2d 290, 98 S Ct 2408; New Jersey v Portash, supra, at 459, 59 L Ed 2d 501, 99 S Ct 1292; Rose v Clark, supra, at 577, 578, and n 6, 92 L Ed 2d 460, 106 S Ct 3101.

Chapman specifically noted three constitutional errors that could not be categorized as harmless error: using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge. The majority attempts to distinguish the use of a coerced confession from the other two errors listed in Chapman first by distorting the decision in Payne, and then by drawing a meaningless dichotomy between "trial errors" and "structural defects" in the trial process. Viewing Payne as merely rejecting a test whereby the admission of a coerced confession could stand if there were "sufficient evidence," other than the confession, to support the conviction, the majority suggests that the Court in Payne might have reached a different result had it been considering a harmless-error test. Post, at 309, 113 L Ed 2d, at 331 (opinion of Rehnquist, C. J.). It is clear, though, that in Payne the Court recognized that *regardless* of the amount of

other evidence, "the admission in evidence, over objection, of the coerced confession vitiates the judgment," because "where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession." 356 US, at 568, 2 L Ed 2d 975, 78 S Ct 844. The inability to assess its effect on a conviction causes the admission at trial of a coerced confession to "defy analysis by 'harmless-error' standards," cf. post, at 309, 113 L Ed 2d, at 331 (opinion of Rehnquist, C. J.), just as certainly as do deprivation of counsel and trial before a biased judge.

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The majority also attempts to distinguish "trial errors" which occur "during the presentation of the case to the jury," post, at 307, 113 L Ed 2d, at 330, and which it deems susceptible to harmless-error analysis, from "structural defects in the constitution of the trial mechanism," post, at 309, 113 L Ed 2d, at 331, which the majority concedes cannot be so analyzed. This effort fails, for our jurisprudence on harmless error has not classified so neatly the errors at issue. For example, we have held susceptible to harmless-error analysis the failure to instruct the jury on the presumption of innocence, Kentucky v Whorton, 441 US 786, 60 L Ed 2d 640, 92 S Ct 2088 (1979), while finding it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable doubt standard, Jackson v Virginia, 443 US 307, 320, n 14, 61 L Ed 2d 560, 99 S Ct 2781 (1979). These cases cannot be reconciled by labeling the former "trial error" and the latter not, for both concern the exact same stage in the trial proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial. A jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process, because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt. See Whorton, supra, at 789, 60 L Ed 2d 640, 92 S Ct 2088; Taylor v Kentucky, 436 US 478, 488-490, 56 L Ed 2d 468, 98 S Ct 1930 (1978). While it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable-doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt. In addition, omission of a reasonable-doubt instruction, though a "trial error," distorts the very structure of the trial because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof. Cf. Cool v United States, 409 US 100, 104, 34 L Ed 2d 335, 93 S Ct 354 (1972); In re Winship, 397 US 358, 364, 25 L Ed 2d 368, 90 S Ct 1068 (1970).

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These same concerns counsel against applying harmless-error analysis to the admission of a coerced confession. A defendant's confession is "probably the most probative and damaging evidence that can be admitted against him," Cruz v New York, 481 US 186, 195, 95 L Ed 2d 162, 107 S Ct 1714 (1987) (White, J., dissenting), so damaging that a jury should not be expected to ignore it even if told to do so, Bruton v United States, 391 US 123, 140, 20

L Ed 2d 476, 88 S Ct 1620 (1968) (White, J., dissenting), and because in any event it is impossible to know what credit and weight the jury gave to the confession. Cf. Payne, supra, at 568, 2 L Ed 2d 975, 78 S Ct 844. Concededly, this reason is insufficient to justify a per se bar to the use of *any* confession. Thus, Milton v Wainwright, 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174 (1972), applied harmless-error analysis to a confession obtained and introduced in circumstances that violated the defendant's Sixth Amendment right to counsel.[5] Similarly, the Courts of Appeals have held that the introduction of incriminating statements taken from defendants in violation of Miranda v Arizona, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974 (1966), is subject to treatment as harmless error.[6]

Nevertheless, in declaring that it is "impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment," post, at 312, 113 L Ed 2d, at 332-333 (opinion of Rehnquist, C.J.), the majority overlooks the obvious. Neither Milton v Wainwright nor any of the other cases upon which

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the majority relies involved a defendant's *coerced* confession, nor were there present in these cases the distinctive reasons underlying the exclusion of coerced incriminating statements of the defendant.[7] First, some coerced confessions may be untrustworthy. Jackson v Denno, 378 US, at 385-386, 12 L Ed 2d 908, 84 S Ct 1774, 1 ALR3d 1205; Spano v New York, 360 US, at 320, 3 L Ed 2d 1265, 79 S Ct 1202. Consequently, admission of coerced confessions may distort the truth-seeking function of the trial upon which the majority focuses. More importantly, however, the use of coerced confessions, "whether true or false," is forbidden "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth," Rogers v Richmond, 365 US, at 540-541, 5 L Ed 2d 760, 81 S Ct 735; see also Lego, 404 US, at 485, 30 L Ed 2d

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5. In Satterwhite v Texas, 486 US 249, 100 L Ed 2d 284, 108 S Ct 1792 (1988), and Moore v Illinois, 434 US 220, 54 L Ed 2d 424, 98 S Ct 458 (1977), the harmless-error rule was applied to the admission of evidence in violation of the Sixth Amendment Counsel Clause, but in neither case did the error involve admitting a confession or an incriminating statement of the defendant, which was the case in Milton v Wainwright.

6. Howard v Pung, 862 F2d 1348, 1351 (CA8 1988), cert denied, 492 US 920, 106 L Ed 2d 593, 109 S Ct 3247 (1989); United States v Johnson, 816 F2d 918, 923 (CA3 1987); Bryant v Vose, 785 F2d 364, 367 (CA1), cert denied, 477 US 907, 91 L Ed 2d 570, 106 S Ct 3281 (1986); Martin v Wainwright, 770 F2d 918, 932 (CA11 1985), modified, 781 F2d 185, cert denied, 479 US 909, 93 L Ed 2d 281, 107 S Ct 307 (1986); United States v Ramirez, 710 F2d 535, 542-543 (CA9 1983); Harryman v Estelle, 616 F2d 870, 875 (CA5) (en banc), cert denied, 449 US 860, 66 L Ed 2d 76, 101 S Ct 161 (1980).

7. The same can be said of the Miranda cases. As the Court has recognized, a Miranda violation "does not mean that the statements received have actually been coerced, but only that the courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." Oregon v Elstad, 470 US 298, 310, 84 L Ed 2d 222, 105 S Ct 1285 (1985). See also New York v Quarles, 467 US 649, 654, 81 L Ed 2d 550, 104 S Ct 2626 (1984).

618, 92 S Ct 619. This reflects the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," Blackburn v Alabama, 361 US, at 206-207, 4 L Ed 2d 242, 80 S Ct 274, as well as "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves," Spano, supra, at 320-321, 3 L Ed 2d 1265, 79 S Ct 1202. Thus, permitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an

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inquisitorial system of criminal justice. Cf. Chambers v Florida, 309 US, at 235-238, 84 L Ed 716, 60 S Ct 472.

As the majority concedes, there are other constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error. For example, a judge in a criminal trial "is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see Sparf & Hansen v United States, 156 US 51, 105 [39 L Ed 343, 15 S Ct 273] (1895); Carpenters v United States, 330 US 395, 408 [91 L Ed 973, 67 S Ct 775] (1947), regardless of how overwhelmingly the evidence may point in that direction." United States v Martin Linen Supply Co., 430 US 564, 572-573, 51 L Ed 2d 642, 97 S Ct 1349 (1977). A defendant is entitled to counsel at trial, Gideon v Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733 (1963), and as Chapman recognized, violating this right can never be harmless error. 386 US, at 23, and n 8, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065. See also White v Maryland, 373 US 59, 10 L Ed 2d 193, 83 S Ct 1050 (1963), where a conviction was set aside because the defendant had not had counsel at a preliminary hearing without regard to the showing of prejudice. In Vasquez v Hillery, 474 US 254, 88 L Ed 2d 598, 106 S Ct 617 (1986), a defendant was found guilty beyond reasonable doubt, but the conviction had been set aside because of the unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt. The error at the grand jury stage struck at fundamental values of our society and "undermine[d] the structural integrity of the criminal tribunal itself, and [was] not amenable to harmless-error review." Id., at 263-264, 88 L Ed 2d 598, 106 S Ct 617. Vasquez, like Chapman, also noted that rule of automatic reversal when a defendant is tried before a judge with a financial interest in the outcome, Tumey v Ohio, 273 US 510, 535, 71 L Ed 749, 47 S Ct 437, 50 ALR 1243 (1927), despite a lack of any indication that bias influenced the decision. Waller v Georgia, 467 US 39, 49, 81 L Ed 2d 31, 104 S Ct 2210 (1984), recognized that violation of the guarantee of a public trial required reversal without any showing of prejudice and even though the values

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of a public trial may be intangible and unprovable in any particular case.

The search for truth is indeed central to our system of justice, but

"certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." Rose v Clark, 478 US, at 587, 92 L Ed 2d 460, 106 S Ct 3101 (Stevens, J., concurring in judgment). The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession "abort[s] the basic trial process" and "render[s] a trial fundamentally unfair." Id., at 577, 578, n 6, 92 L Ed 2d 460, 106 S Ct 3101.

For the foregoing reasons the four of us would adhere to the consistent line of authority that has recognized as a basic tenet of our criminal justice system, before and after both Miranda and Chapman, the prohibition against using a defendant's coerced confession against him at his criminal trial. Stare decisis is "of fundamental importance to the rule of law," Welch v Texas Dept. of Highways and Public Transportation, 483 US 468, 494, 97 L Ed 2d 389, 107 S Ct 2941 (1987); the majority offers no convincing reason for overturning our long line of decisions requiring the exclusion of coerced confessions.

IV

[5a, 6a, 7, 8] Since five Justices have determined that harmless-error analysis applies to coerced confessions, it becomes necessary to evaluate under that ruling the admissibility of Fulminante's confession to Sarivola. Cf. Pennsylvania v Union Gas Co., 491 US 1, 45, 105 L Ed 2d 1, 109 S Ct 2273 (1989) (White, J., concurring in judgment in part and dissenting in part); id., at 57, 105 L Ed 2d 1, 109 S Ct 2273 (O'Connor, J., dissenting). Chapman v California, 386 US, at 24, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, made clear that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Court has the power to review the record de novo in order to determine an error's harmlessness. See ibid.; Satterwhite v

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Texas, 486 US, at 258, 100 L Ed 2d 284, 108 S Ct 1792. In so doing, it must be determined whether the State has met its burden of demonstrating that the admission of the confession to Sarivola did not contribute to Fulminante's conviction. Chapman, supra, at 26, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065. Five of us are of the view that the State has not carried its burden and accordingly affirm the judgment of the court below reversing petitioner's conviction.

[9] A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." Bruton v United States, 391 US, at 139-140, 20 L Ed 2d 476, 88 S Ct 1620 (White, J., dissenting). See also Cruz v New York, 481 US, at 195, 95 L Ed 2d 162, 107 S Ct 1714 (White, J., dissenting) (citing Bruton). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when

linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

In the Arizona Supreme Court's initial opinion, in which it determined that harmless-error analysis could be applied to the confession, the court found that the admissible second confession to Donna Sarivola rendered the first confession to Anthony Sarivola cumulative. 161 Ariz, at 245-246, 778 P2d, at 610-611. The court also noted that circumstantial physical evidence concerning the wounds, the ligature around Jeneane's neck, the location of the body, and the presence of

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motorcycle tracks at the scene corroborated the second confession. Ibid. The court concluded that "due to the overwhelming evidence adduced from the second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict" Fulminante. Id., at 246, 778 P2d, at 611.

[5b] We have a quite different evaluation of the evidence. Our review of the record leads us to conclude that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Anthony Sarivola was harmless error. Three considerations compel this result.

First, the transcript discloses that both the trial court and the State recognized that a successful prosecution depended on the jury believing the two confessions. Absent the confessions, it is unlikely that Fulminante would have been prosecuted at all, because the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict. Indeed, no indictment was filed until nearly two years after the murder.[8] App 2. Although the police had suspected Fulminante from the beginning, as the prosecutor acknowledged in his opening statement to the jury, "[W]hat brings us to Court, what makes this case fileable, and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife." Id., at 65-66. After trial began, during a renewed hearing on Fulminante's motion to suppress, the trial court opined, "You know, I think from what little I know about this trial, the character of this man [Sarivola] for truthfulness or untruthfulness and his credibility is the centerpiece of this case, is it not?" The prosecutor responded, "It's very important, there's no doubt." Id., at 62. Finally, in his

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closing argument, the prosecutor prefaced his discussion of the two confessions by conceding: "[W]e have a lot of [circumstantial] evidence that indicates that this is

8. Although Fulminante had allegedly confessed to Donna Sarivola several months previously, police did not yet know of this confession, which Anthony Sarivola did not mention to them until June 1985. App 90-92. They did, however, know of the first confession, which Fulminante had given to Anthony Sarivola nearly a year before.

our suspect, this is the fellow that did it, but it's a little short as far as saying that it's proof that he actually put the gun to the girl's head and killed her. So it's a little short of that. We recognize that." 10 Tr 75 (Dec. 17, 1985).

Second, the jury's assessment of the confession to Donna Sarivola could easily have depended in large part on the presence of the confession to Anthony Sarivola. Absent the admission at trial of the first confession, the jurors might have found Donna Sarivola's story unbelievable. Fulminante's confession to Donna Sarivola allegedly occurred in May 1984, on the day he was released from Ray Brook, as she and Anthony Sarivola drove Fulminante from New York to Pennsylvania. Donna Sarivola testified that Fulminante, whom she had never before met, confessed in detail about Jeneane's brutal murder in response to her casual question concerning why he was going to visit friends in Pennsylvania instead of returning to his family in Arizona. App 167-168. Although she testified that she was "disgusted" by Fulminante's disclosures, id., at 169, she stated that she took no steps to notify authorities of what she had learned, id., at 172-173. In fact, she claimed that she barely discussed the matter with Anthony Sarivola, who was in the car and overheard Fulminante's entire conversation with Donna. Id., at 174-175. Despite her disgust for Fulminante, Donna Sarivola later went on a second trip with him. Id., at 173-174. Although Sarivola informed authorities that he had driven Fulminante to Pennsylvania, he did not mention Donna's presence in the car or her conversation with Fulminante. Id., at 159-161. Only when questioned by authorities in June 1985 did Anthony Sarivola belatedly recall the confession to Donna more than a year before, and only then did he ask if she would be willing to discuss the matter with authorities. Id., at 90-92.

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[5c] Although some of the details in the confession to Donna Sarivola were corroborated by circumstantial evidence, many, including details that Jeneane was choked and sexually assaulted, were not. Id., at 186-188. As to other aspects of the second confession, including Fulminante's motive and state of mind, the *only* corroborating evidence was the first confession to Anthony Sarivola.[9] No. CR 142821 (Super Ct Mari-

9. **[5d]** The inadmissible confession to Anthony Sarivola was itself subject to serious challenge. Sarivola's lack of moral integrity was demonstrated by his testimony that he had worked for organized crime during the time he was a uniformed police officer. App 74-75, 104-105. His overzealous approach to gathering information for which he would be paid by authorities, id., at 79, was revealed by his admission that he had fabricated a tape recording in connection with an earlier, unrelated FBI investigation, id., at 96-98. He received immunity in connection with the information he provided. Id., at 129. His eagerness to get in and stay in the federal Witness Protection Program provided a motive for giving detailed information to authorities. Id., at 114, 129-131. During his first report of the confession, Sarivola failed to hint at numerous details concerning an alleged sexual assault on Jeneane; he mentioned them for the first time more than a year later during further interrogation, at which he also recalled, for the first time, the confession to Donna Sarivola. Id., at 90-92, 148-149. The impeaching effect of each of these factors was undoubtedly undercut by the presence of the second confession, which, not surprisingly, recounted a quite similar story and thus corroborated the first confession. Thus, each confession, though easily impeachable if viewed in isolation, became difficult to discount when viewed in conjunction with the other.

copa County, Ariz. Feb. 11, 1986), pp 3-4. Thus, contrary to what the Arizona Supreme Court found, it is clear that the jury might have believed that the two confessions reinforced and corroborated each other. For this reason, one confession was *not* merely cumulative of the other. While in some cases two confessions, delivered on different occasions to different listeners, might be viewed as being independent of each other, cf. Milton v Wainwright, 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174 (1972), it strains credulity to think that the jury so viewed the two confessions in this case, especially given the close relationship between Donna and Anthony Sarivola.

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The jurors could also have believed that Donna Sarivola had a motive to lie about the confession in order to assist her husband. Anthony Sarivola received significant benefits from federal authorities, including payment for information, immunity from prosecution, and eventual placement in the federal Witness Protection Program. App 79, 114, 129-131. In addition, the jury might have found Donna motivated by her own desire for favorable treatment, for she, too, was ultimately placed in the Witness Protection Program. Id., at 176, 179-180.

[5e, 10a] Third, the admission of the first confession led to the admission of other evidence prejudicial to Fulminante. For example, the State introduced evidence that Fulminante knew of Sarivola's connections with organized crime in an attempt to explain why Fulminante would have been motivated to confess to Sarivola in seeking protection. Id., at 45-48, 67. Absent the confession, this evidence would have had no relevance and would have been inadmissible at trial. The Arizona Supreme Court found that the evidence of Sarivola's connections with organized crime reflected on Sarivola's character, not Fulminante's, and noted that the evidence could have been used to impeach Sarivola. 161 Ariz, at 245-246, 778 P2d, at 610-611. This analysis overlooks the fact that had the confession not been admitted, there would have been no reason for Sarivola to testify and thus no need to impeach his testimony. Moreover, we cannot agree that the evidence did not reflect on Fulminante's character as well, for it depicted him as someone who willingly sought out the company of criminals. It is quite possible that this evidence led the jury to view Fulminante as capable of murder.[10]

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[5f] Finally, although our concern here is with the effect of the erroneous admission of the confession on Fulminante's conviction, it is clear that the presence of the confession also influenced the sentencing phase of the trial. Under Arizona law, the trial judge is the sentencer. Ariz Rev Stat Ann § 13-703(B) (1989). At the sentencing hearing, the admissibility of information regarding aggravating circumstances is governed by the rules of evidence applicable to criminal trials. § 13-703(C). In this case, "based upon admissible evidence

10. **[10b]** Fulminante asserts that other prejudicial evidence, including his prior felony convictions and incarcerations, and his prison reputation for untruthfulness, likewise would not have been admitted had the confession to Sarivola been excluded. Brief for Respondent 31-32. Because we find that the admission of the confession was not harmless in any event, we express no opinion as to the effect any of this evidence might have had on Fulminante's conviction.

produced at the trial," No. CR 142821, supra, at 2, the judge found that only one aggravating circumstance existed beyond a reasonable doubt, i.e., that the murder was committed in "an *especially* heinous, cruel, and depraved manner." Ibid.; see § 13-703(F)(6). In reaching this conclusion, the judge relied heavily on evidence concerning the manner of the killing and Fulminante's motives and state of mind which could only be found in the two confessions. For example, in labeling the murder "cruel," the judge focused in part on Fulminante's alleged statements that he choked Jeneane and made her get on her knees and beg before killing her. No. CR 142821, supra, at 3. Although the circumstantial evidence was not inconsistent with this determination, neither was it sufficient to make such a finding beyond a reasonable doubt. Indeed, the sentencing judge acknowledged that the confessions were only partly corroborated by other evidence. Ibid.

In declaring that Fulminante "acted with an especially heinous and depraved state of mind," the sentencing judge relied solely on the two confessions. Id., at 4. While the judge found that the statements in the confessions regarding the alleged sexual assault on Jeneane should not be considered on the issue of cruelty because they were not corroborated by other evidence, the judge determined that they were worthy of belief on the issue of Fulminante's state of

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mind. Ibid. The judge then focused on Anthony Sarivola's statement that Fulminante had made vulgar references to Jeneane during the first confession, and on Donna Sarivola's statement that Fulminante had made similar comments to her. Ibid. Finally, the judge stressed that Fulminante's alleged comments to the Sarivolas concerning torture, choking, and sexual assault, "whether they all occurred or not," ibid., depicted "a man who was bragging and relishing the crime he committed." Id., at 5.

Although the sentencing judge might have reached the same conclusions even without the confession to Anthony Sarivola, it is impossible to say so beyond a reasonable doubt. Furthermore, the judge's assessment of Donna Sarivola's credibility, and hence the reliability of the second confession, might well have been influenced by the corroborative effect of the erroneously admitted first confession. Indeed, the fact that the sentencing judge focused on the similarities between the two confessions in determining that they were reliable suggests that either of the confessions alone, even when considered with all the other evidence, would have been insufficient to permit the judge to find an aggravating circumstance beyond a reasonable doubt as a requisite prelude to imposing the death penalty.

[5g, 6b] Because a majority of the Court has determined that Fulminante's confession to Anthony Sarivola was coerced and because a majority has determined that admitting this confession was not harmless beyond a reasonable doubt, we agree with the Arizona Supreme Court's conclusion that Fulminante is entitled to a new trial at which the confession is not admitted. Accordingly the judgment of the Arizona Supreme Court is affirmed.

SEPARATE OPINIONS

Chief Justice **Rehnquist**, with whom Justice **O'Connor** joins, Justice **Kennedy** and Justice **Souter** join as to Parts I and II, and Justice **Scalia** joins as to Parts II and
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III, delivered the opinion of the Court with respect to Part II, and a dissenting opinion with respect to Parts I and III.

The Court today properly concludes that the admission of an "involuntary" confession at trial is subject to harmless-error analysis. Nonetheless, the independent review of the record which we are required to make shows that respondent Fulminante's confession was not in fact involuntary. And even if the confession were deemed to be involuntary, the evidence offered at trial, including a second, untainted confession by Fulminante, supports the conclusion that any error here was certainly harmless.

I

The question whether respondent Fulminante's confession was voluntary is one of federal law. "Without exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." Miller v Fenton, 474 US 104, 110, 88 L Ed 2d 405, 106 S Ct 445 (1985). In Mincey v Arizona, 437 US 385, 57 L Ed 2d 290, 98 S Ct 2408 (1978), we overturned a determination by the Supreme Court of Arizona that a statement of the defendant was voluntary, saying "we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record." Id., at 398, 57 L Ed 2d 290, 98 S Ct 2408.

The admissibility of a confession such as that made by respondent Fulminante depends upon whether it was voluntarily made. "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."
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Culombe v Connecticut, 367 US 568, 602, 6 L Ed 2d 1037, 81 S Ct 1860 (1961) (quoted in Schneckloth v Bustamonte, 412 US 218, 225-226, 36 L Ed 2d 854, 93 S Ct 2041 (1973)).

In this case the parties stipulated to the basic facts at the hearing in the Arizona trial court on respondent's motion to suppress the confession. Anthony Sarivola, an inmate at the Ray Brook Prison, was a paid confidential informant for the FBI. While at Ray Brook, various rumors reached Sarivola that Oreste Fulminante, a fellow inmate who had befriended Sarivola, had killed his stepdaughter in Arizona. Sarivola passed these rumors on to his FBI contact, who told him "to find out more about it." Sarivola, having already discussed the rumors with the defendant on several occasions, asked him whether the rumors were true, adding that he might be in a position to protect Fulminante from physical recriminations in prison, but that "[he] must tell him the truth." Fulminante then confessed to Sarivola that he had in fact killed his stepdaughter in Arizona, and

provided Sarivola with substantial details about the manner in which he killed the child. At the suppression hearing, Fulminante stipulated to the fact that "[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection.' " App 10. The trial court was also aware, through an excerpt from Sarivola's interview testimony which the defendant appended to his reply memorandum, that Sarivola believed Fulminante's time was "running short" and that he would "have went out of the prison horizontally." Id., at 28. The trial court found that respondent's confession was voluntary.

The Supreme Court of Arizona stated that the trial court committed no error in finding the confession voluntary based on the record before it. But it overturned the trial court's finding of voluntariness based on the more comprehensive trial record before it, which included, in addition to the facts stipulated at the suppression hearing, a statement made by Sarivola at the trial that "the defendant had been receiving 'rough treatment from the guys, and if the defendant would

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tell the truth, he could be protected.' " 161 Ariz 237, 244, n 1, 778 P2d 602, 609, n 1 (1989). It also had before it the presentence report, which showed that Fulminante was no stranger to the criminal justice system: He had six prior felony convictions and had been imprisoned on three prior occasions.

On the basis of the record before it, the Supreme Court stated:

> "Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was 'extremely coercive' because the 'obvious' inference from the promise was that his life would be in jeopardy if he did not confess. We agree." Id., at 243, 778 P2d, at 608.

Exercising our responsibility to make the independent examination of the record necessary to decide this federal question, I am at a loss to see how the Supreme Court of Arizona reached the conclusion that it did. Fulminante offered no evidence that he believed that his life was in danger or that he in fact confessed to Sarivola in order to obtain the proffered protection. Indeed, he had stipulated that "[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection.' " App 10. Sarivola's testimony that he told Fulminante that "if [he] would tell the truth, he could be protected," adds little if anything to the substance of the parties' stipulation. The decision of the Supreme Court of Arizona rests on an assumption that is squarely contrary to this stipulation, and one that is not supported by any testimony of Fulminante.

The facts of record in the present case are quite different from those present in cases where we have found confessions

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to be coerced and involuntary. Since Fulminante was unaware that Sarivola was an FBI informant, there existed none of "the danger of coercion result[ing]

from the interaction of custody and official interrogation." Illinois v Perkins, 496 US 292, 297, 110 L Ed 2d 243, 110 S Ct 2394 (1990). The fact that Sarivola was a government informant does not by itself render Fulminante's confession involuntary, since we have consistently accepted the use of informants in the discovery of evidence of a crime as a legitimate investigatory procedure consistent with the Constitution. See, e. g., Kuhlmann v Wilson, 477 US 436, 91 L Ed 2d 364, 106 S Ct 2616 (1986); United States v White, 401 US 745, 28 L Ed 2d 453, 91 S Ct 1122 (1971); Hoffa v United States, 385 US 293, 304, 17 L Ed 2d 374, 87 S Ct 408 (1966). The conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola's company. Sarivola at no time threatened him or demanded that he confess; he simply requested that he speak the truth about the matter. Fulminante was an experienced habitue of prisons and presumably able to fend for himself. In concluding on these facts that Fulminante's confession was involuntary, the Court today embraces a more expansive definition of that term than is warranted by any of our decided cases.

II

[11a] Since this Court's landmark decision in Chapman v California, 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. See, e. g., Clemons v Mississippi, 494 US 738, 752-754, 108 L Ed 2d 725, 110 S Ct 1441 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); Satterwhite v Texas, 486 US 249, 100 L Ed 2d 284, 108 S Ct 1792 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); Carella v California, 491 US 263, 266, 105 L Ed 2d 218, 109 S Ct 2419 (1989)

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(jury instruction containing an erroneous conclusive presumption); Pope v Illinois, 481 US 497, 501-504, 95 L Ed 2d 439, 107 S Ct 1918 (1987) (jury instruction misstating an element of the offense); Rose v Clark, 478 US 570, 92 L Ed 2d 460, 106 S Ct 3101 (1986) (jury instruction containing an erroneous rebuttable presumption); Crane v Kentucky, 476 US 683, 691, 90 L Ed 2d 636, 106 S Ct 2142 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); Delaware v Van Arsdall, 475 US 673, 89 L Ed 2d 674, 106 S Ct 1431 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); Rushen v Spain, 464 US 114, 117-118, and n 2, 78 L Ed 2d 267, 104 S Ct 453 (1983) (denial of a defendant's right to be present at trial); United States v Hasting, 461 US 499, 76 L Ed 2d 96, 103 S Ct 1974 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); Hopper v Evans, 456 US 605, 72 L Ed 2d 367, 102 S Ct 2049 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); Kentucky v Whorton, 441 US 786, 60 L Ed 2d

640, 99 S Ct 2088 (1979) (failure to instruct the jury on the presumption of innocence); Moore v Illinois, 434 US 220, 232, 54 L Ed 2d 424, 98 S Ct 458 (1977) (admission of identification evidence in violation of the Sixth Amendment Confrontation Clause); Brown v United States, 411 US 223, 231-232, 36 L Ed 2d 208, 93 S Ct 1565 (1973) (admission of the out-of-court statement of a non-testifying codefendant in violation of the Sixth Amendment Counsel Clause); Milton v Wainwright, 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174 (1972) (confession obtained in violation of Massiah v United States, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199 (1964)); Chambers v Maroney, 399 US 42, 52-53, 26 L Ed 2d 419, 90 S Ct 1975 (1970) (admission of evidence obtained in violation of the Fourth Amendment); Coleman v Alabama, 399 US 1, 10-11, 26 L Ed 2d 387, 90 S Ct 1999 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

The common thread connecting these cases is that each involved "trial error"—error which occurred during the presentation of the case to the jury, and which may therefore

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be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. In applying harmless-error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Van Arsdall, supra, at 681, 89 L Ed 2d 674, 106 S Ct 1431 (citations omitted).

[12a, 13] In Chapman v California, supra, the Court stated:

> "Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal.

"[8] See, e.g., Payne v Arkansas, 356 US 560 [2 L Ed 2d 975, 78 S Ct 844] (coerced confession); Gideon v Wainwright, 372 US 335 [9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733] (right to counsel); Tumey v Ohio, 273 US 510 [71 L Ed 749, 47 S Ct 437, 50 ALR 1243] (impartial judge)." Id., at 23, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065.

It is on the basis of this language in Chapman that Justice White in dissent concludes that the principle of stare decisis requires us to hold that an involuntary confession is not subject to harmless-error analysis. We believe that there are several reasons which lead to a contrary conclusion. In the first place, the quoted language from Chapman does not by its terms adopt any such rule in that case. The language that "[a]lthough our prior cases have indicated," coupled with the relegation of the cases themselves to a footnote, is more appropriately regarded as a historical reference to the holdings of these cases. This view is buttressed by an examination of the opinion in Payne v Arkansas, 356 US 560, 2 L Ed 2d 975, 78 S Ct 844 (1958), which is the case referred to for the proposition that

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an involuntary confession may

not be subject to harmless-error analysis. There the Court said:

> "Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, an involuntary confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." Id., at 567-568, 2 L Ed 2d 975, 78 S Ct 844.

It is apparent that the State's argument which the Court rejected in Payne is not the harmless-error analysis later adopted in Chapman, but a much more lenient rule which would allow affirmance of a conviction if the evidence other than the involuntary confession was sufficient to sustain the verdict. This is confirmed by the dissent of Justice Clark in that case, which adopted the more lenient test. Such a test would, of course—unlike the harmless-error test—make the admission of an involuntary confession virtually risk free for the State.

[11b, 12b, 14] The admission of an involuntary confession—a classic "trial error"—is markedly different from the other two constitutional violations referred to in the Chapman footnote as not being subject to harmless-error analysis. One of those violations, involved in Gideon v Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733 (1963), was the total deprivation of the right to counsel at trial. The other violation, involved in Tumey v Ohio, 273 US 510, 71 L Ed 749, 47 S Ct 437, 50 ALR 1243 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously

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affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in Chapman, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, Vasquez v Hillery, 474 US 254, 88 L Ed 2d 598, 106 S Ct 617 (1986); the right to self-representation at trial, McKaskle v Wiggins, 465 US 168, 177-178, n 8, 79 L Ed 2d 122, 104 S Ct 944 (1984); and the right to public trial, Waller v Georgia, 467 US 39, 49, n 9, 81 L Ed 2d 31, 104 S Ct 2210 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Rose v Clark, 478 US, at 577-578, 92 L Ed 2d 460, 106 S Ct 3101 (citation omitted).

[12c] It is evident from a comparison of the constitutional violations

which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions belong in the former category. The admission of an involuntary confession is a "trial error," similar in both degree and kind to the erroneous admission of other types of evidence. The evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment—of evidence seized in violation of the Fourth Amendment—or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment. When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

[499 US 311]

Nor can it be said that the admission of an involuntary confession is the type of error which "transcends the criminal process." This Court has applied harmless-error analysis to the violation of other constitutional rights similar in magnitude and importance and involving the same level of police misconduct. For instance, we have previously held that the admission of a defendant's statements obtained in violation of the Sixth Amendment is subject to harmless-error analysis. In Milton v Wainwright, 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174 (1972), the Court held the admission of a confession obtained in violation of Massiah v United States, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199 (1964), to be harmless beyond a reasonable doubt. We have also held that the admission of an out-of-court statement by a nontestifying codefendant is subject to harmless-error analysis. Brown v United States, 411 US, at 231-232, 36 L Ed 2d 208, 93 S Ct 1565; Schneble v Florida, 405 US 427, 31 L Ed 2d 340, 92 S Ct 1056 (1972); Harrington v California, 395 US 250, 23 L Ed 2d 284, 89 S Ct 1726 (1969). The inconsistent treatment of statements elicited in violation of the Sixth and Fourteenth Amendments, respectively, can be supported neither by evidentiary or deterrence concerns nor by a belief that there is something more "fundamental" about involuntary confessions. This is especially true in a case such as this one where there are no allegations of physical violence on behalf of the police. A confession obtained in violation of the Sixth Amendment has the same evidentiary impact as does a confession obtained in violation of a defendant's due process rights. Government misconduct that results in violations of the Fourth and Sixth Amendments may be at least as reprehensible as conduct that results in an involuntary confession. For instance, the prisoner's confession to an inmate-informer at issue in Milton, which the Court characterized as implicating the Sixth Amendment right to counsel, is similar on its facts to the one we face today. Indeed, experience shows that law enforcement violations of these constitutional guarantees can involve conduct as egregious as police conduct used to elicit statements in violation of the Fourteenth Amendment. It is thus

[499 US 312]

impossible to create a meaningful distinction between confessions elicited in violation of the Sixth

Amendment and those in violation of the Fourteenth Amendment.

Of course an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant—but this simply means that a reviewing court will conclude in such a case that its admission was not harmless error; it is not a reason for eschewing the harmless-error test entirely. The Supreme Court of Arizona, in its first opinion in the present case, concluded that the admission of Fulminante's confession *was* harmless error. That court concluded that a second and more explicit confession of the crime made by Fulminante after he was released from prison was not tainted by the first confession, and that the second confession, together with physical evidence from the wounds (the victim had been shot twice in the head with a large calibre weapon at close range and a ligature was found around her neck) and other evidence introduced at trial rendered the admission of the first confession harmless beyond a reasonable doubt. 161 Ariz, at 245-246, 778 P2d, at 610-611.

III

I would agree with the finding of the Supreme Court of Arizona in its initial opinion—in which it believed harmless-error analysis was applicable to the admission of involuntary confessions—that the admission of Fulminante's confession was harmless. Indeed, this seems to me to be a classic case of harmless error: a second confession giving more details of the crime than the first was admitted in evidence and found to be free of any constitutional objection. Accordingly, I would affirm the holding of the Supreme Court of Arizona in its initial opinion and reverse the judgment which it ultimately rendered in this case.

[499 US 313]

Justice **Kennedy,** concurring in the judgment.

For the reasons stated by The Chief Justice, I agree that Fulminante's confession to Anthony Sarivola was not coerced. In my view, the trial court did not err in admitting this testimony. A majority of the Court, however, finds the confession coerced and proceeds to consider whether harmless-error analysis may be used when a coerced confession has been admitted at trial. With the case in this posture, it is appropriate for me to address the harmless-error issue.

Again for the reasons stated by The Chief Justice, I agree that harmless-error analysis should apply in the case of a coerced confession. That said, the court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence. If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence. For the reasons given by Justice White in Part IV of his opinion, I cannot

with confidence find admission of Fulminante's confession to Anthony Sarivola to be harmless error.

The same majority of the Court does not agree on the three issues presented by the trial court's determination to admit Fulminante's first confession: whether the confession was inadmissible because coerced; whether harmless-error analysis is appropriate; and if so whether any error was harmless here. My own view that the confession was not coerced does not command a majority.

In the interests of providing a clear mandate to the Arizona Supreme Court in this capital case, I deem it proper to accept in the case now before us the holding of five Justices that the

[499 US 314]

confession was coerced and inadmissible. I agree with a majority of the Court that admission of the confession could not be harmless error when viewed in light of all the other evidence; and so I concur in the judgment to affirm the ruling of the Arizona Supreme Court.

EDITOR'S NOTE

An annotation on "Prejudicial effect of admitting at criminal trial evidence of confession or other self-incriminating statement obtained from accused in violation of Federal Constitution—Supreme Court cases," appears p 757, infra.

[499 US 315]

UNITED STATES, Petitioner

v

THOMAS M. GAUBERT

499 US 315, 113 L Ed 2d 335, 111 S Ct 1267

[No. 89-1793]

Argued November 26, 1990. Decided March 26, 1991.

Decision: Discretionary function exception of Federal Tort Claims Act (28 USCS § 2680(a)) held to bar claims against federal agencies for negligent supervision of savings and loan operations.

SUMMARY

The Federal Home Loan Bank Board (FHLBB), which was empowered under the former 12 USCS § 1464(a) (later repealed) to regulate federal savings and loan associations, and the Federal Home Loan Bank-Dallas (FHLB-D), an agency established by the FHLBB under the former 12 USCS § 1423 (later repealed), sought to have a Texas-chartered and federally insured savings and loan association merge with a second, failing Texas thrift institution. Because the federal regulators were concerned about certain financial dealings of the savings and loan's chairman, who was also the largest shareholder, the regulators requested that the chairman (1) sign an agreement that effectively removed him from management, and (2) post security for his personal guarantee that the savings and loan's net worth would exceed regulatory minimums. The chairman agreed to these conditions, and the regulators provided regulatory and financial advice to enable the savings and loan to consummate the merger. Subsequently, the regulators threatened to close the savings and loan unless its management and board of directors were replaced. New officers and directors, recommended by the FHLB-D, took over. The FHLB-D, becoming more active in the savings and loan's day-to-day business, (1) recommended the hiring of a financial consultant, (2) urged the savings and loan to convert from state to federal charter, (3) gave advice as to whether, when, and how the savings and loan's subsidiaries should be placed into bankruptcy, (4) mediated salary disputes, (5) reviewed the draft of a complaint to be used in litigation, and (6) actively intervened when a state regulatory agency attempted to install a

Briefs of Counsel, p 768, infra.

supervisory agent at the savings and loan. Shortly after taking over, the new directors announced that the savings and loan had a substantial negative net worth. The former chairman, filing an administrative tort claim with the FHLBB, the FHLB-D, and the Federal Savings and Loan Insurance Corporation, sought damages for the lost value of his shares and for the property that he had forfeited under his personal guarantee. After the administrative claim was denied, the former chairman filed suit in the United States District Court for the Northern District of Texas under the Federal Tort Claims Act (FTCA) (28 USCS §§ 1346(b), 2671 et seq.), in which suit he sought damages for the alleged negligence of the federal regulators in selecting the new officers and directors and in participating in the day-to-day management of the savings and loan. The District Court, granting a motion to dismiss, found that all the challenged actions of the regulators fell within the "discretionary function" exception of the FTCA (28 USCS § 2680(a)). On appeal, the United States Court of Appeals for the Fifth Circuit reversed the dismissal of the claims that concerned the regulators' activities after their assumption of a supervisory role in the savings and loan's day-to-day affairs, on the ground that such actions were "operational actions," rather than "policy decisions," and thus did not fall within the discretionary function exception (885 F2d 1284).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by WHITE, J., joined by REHNQUIST, Ch. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., it was held that (1) the former chairman's FTCA claims based on the federal regulators' participation in the day-to-day management of the savings and loan were barred by the discretionary function exception, because each of the actions in question (a) was discretionary rather than mandatory, and (b) involved the kind of public-policy judgment that is shielded by the discretionary function exception; (2) neither the pervasiveness of the federal regulators' presence at the savings and loan nor the forcefulness of their recommendations was sufficient to alter the supervisory nature of the regulators' actions so as to render the regulators' alleged negligence actionable under the FTCA; and (3) the fact that the challenged actions occurred in the course of day-to-day activities, rather than in the course of establishing broad policies, did not mean that the actions went beyond normal regulatory activity so as to be actionable under the FTCA.

SCALIA, J., concurring in part and concurring in the judgment, expressed the view that (1) a governmental choice is shielded from liability under the FTCA by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of policy and is made by an officer whose official responsibilities include assessment of those considerations; and (2) given the lack of a factual record, it was difficult to say that the particular activities in question were necessarily discretionary functions, since the court could do little more than speculate as to whether the officers in question exercised policymaking responsibility with respect to such individual acts; but (3) the motion to dismiss was properly granted because the FHLBB, by establishing a list of

conditions under which the FHLBB would or would not take over the savings and loan, established guidelines for the exercise of a discretionary function, which act was itself a discretionary function.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

13 Am Jur 2d, Building and Loan Associations §§ 11, 13, 14, 107; 35 Am Jur 2d, Federal Tort Claims Act §§ 16, 18, 19

4 Federal Procedure, L Ed, Banking and Financing §§ 8:525-8:531, 8:575, 8:709; 31 Federal Procedure, L Ed, Tort Claims Against United States §§ 73:349, 73:350

15A Federal Procedural Forms, L Ed, Tort Claims Against United States § 63:181

5 Am Jur Pl & Pr Forms (Rev), Building and Loan Associations, Form 32; 11A Am Jur Pl & Pr Forms (Rev), Federal Tort Claims Act, Forms 1, 79

8 Am Jur Trials 635, Federal Tort Claims Act Proceedings

28 USCS § 2680(a)

L Ed Digest, Building and Loan Associations § 1; Claims § 12

L Ed Index, Building and Loan Associations; Claims Against Government; Federal Home Loan Bank Board; Federal Savings and Loan Insurance Corporation

Index to Annotations, Building and Loan Associations; Discretionary Function or Duty; Federal Home Loan Bank Board; Federal Savings and Loan Insurance Corporation; Federal Tort Claims Act

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Construction and application of 28 USCS § 2680 excepting specified claims from scope of Federal Tort Claims Act. 6 L Ed 2d 1422.

Appointment by Federal Home Loan Bank Board of receivers or conservators to oversee affairs of savings and loan associations, pursuant to § 5(d)(6) of Home Owners' Loan Act of 1933 (12 USCS § 1464(d)(6)). 65 ALR Fed 302.

Claims based on law enforcement and regulatory activities as within 28 USCS § 2680(a) excepting from Federal Tort Claims Act claims involving "discretionary function or duty." 36 ALR Fed 240.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Claims § 12 — Federal Tort Claims Act — discretionary function exception — supervision of savings and loan association

1a-1c. Claims asserted by the former chairman of a savings and loan association against the Federal Home Loan Bank Board and a Federal Home Loan Bank—in which claims it is alleged that those federal regulators were negligent in their supervision of the savings and loan's operations—are barred by the discretionary function exception of the Federal Tort Claims Act (FTCA) (28 USCS § 2680(a)), where each of the challenged actions of the federal regulators—(1) recommending the hiring of a financial consultant, (2) urging the savings and loan to convert from state to federal charter, (3) giving advice as to whether, when, and how the savings and loan's subsidiaries should be placed into bankruptcy, (4) mediating salary disputes, (5) reviewing the draft of a complaint to be used in litigation, and (6) actively intervening when a state regulatory agency attempted to install a supervisory agent at the savings and loan—involves the exercise of discretion in furtherance of public policy goals; neither the pervasiveness of the federal regulators' presence at the savings and loan nor the forcefulness of their recommendations is sufficient to alter the supervisory nature of the regulators' actions so as to render the regulators' alleged negligence actionable under the FTCA; the fact that the challenged actions occurred in the course of day-to-day activities, rather than in the course of establishing broad policies, does not mean that the actions went beyond normal regulatory activity so as to be actionable under the FTCA. (Scalia, J., dissented in part from this holding.)

Building and Loan Associations § 1; Claims § 12 — Federal Tort Claims Act — discretionary function exception — regulatory supervision

2a-2d. For purposes of the discretionary function exception of the Federal Tort Claims Act (28 USCS § 2680(a)), supervisory actions taken by the Federal Home Loan Bank Board (FHLBB) and a Federal Home Loan Bank with respect to the operations of a savings and loan association are discretionary rather than mandatory, where (1) the agencies possessed broad statutory authority to supervise financial institutions; (2) the statutory provisions under which the agencies acted (12 USCS §§ 1464(a), 1464(d)(2)(A), 1464(d)(4)(A), 1464(d)(6)(A) (later repealed)) were not mandatory, but left to the agencies' judgment the decisions of when to institute proceedings against a financial institution and which mechanism to use; (3) although the statutes provided for only formal proceedings, there was nothing in the language or structure of the statutes that prevented the agencies from invoking less formal means of supervision of financial institutions; (4) a statement of policy by the FHLBB established that the agencies had the discretion to supervise the savings and loan through informal means, rather than by invoking statutory sanctions; and (5) each of the challenged actions—(a) recommending the hiring of a financial consultant, (b) urging the savings and loan to convert from state

to federal charter, (c) giving advice as to whether, when, and how the savings and loan's subsidiaries should be placed into bankruptcy, (d) mediating salary disputes, (e) reviewing the draft of a complaint to be used in litigation, and (f) actively intervening when a state regulatory agency attempted to install a supervisory agent at the savings and loan —involved not the mere application of technical skills and business expertise, but rather the exercise of choice and judgment.

Building and Loan Associations § 1; Claims § 12 — Federal Tort Claims Act — discretionary function exception — regulatory supervision — exercise of policy judgment

3a-3c. Supervisory actions taken by the Federal Home Loan Bank Board (FHLBB) and a Federal Home Loan Bank with respect to the operations of a savings and loan association involve the kind of public policy judgment that is shielded by the discretionary function exception to the Federal Government's liability under the Federal Tort Claims Act (28 USCS § 2680(a)), given that (1) a formal statement of policy by the FHLBB, coupled with relevant federal statutory provisions, established governmental policy which is presumed to have been furthered when the regulators undertook day-to-day operational decisions; (2) such decisions were undertaken for the policy reasons of (a) protecting the solvency of the savings and loan industry at large and maintaining the public's confidence in that industry, and (b) preserving the assets of the supervised savings and loan for the benefit of depositors and shareholders; (3) one of the supervisory actions—replacing the savings and loan's management—was taken in order to protect the Federal Savings and Loan Insurance Corporation's insurance fund; (4) other actions—(a) recommending the hiring of a financial consultant, (b) urging the savings and loan to convert from state to federal charter, (c) giving advice as to whether, when, and how the savings and loan's subsidiaries should be placed into bankruptcy, (d) mediating salary disputes, (e) reviewing the draft of a complaint to be used in litigation, and (f) actively intervening when a state regulatory agency attempted to install a supervisory agent at the savings and loan —were directly related to public policy considerations regarding federal oversight of the thrift industry; and (5) there are no allegations that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the relevant federal statutes. (Scalia, J., dissented in part from this holding.)

Claims § 12 — Federal Tort Claims Act — discretionary function exception

4a-4c. The discretionary function exception to the Federal Government's liability under the Federal Tort Claims Act (FTCA) (28 USCS § 2680(a)) covers only acts that involve an element of judgment or choice; the requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because in such a case the employee has no rightful option but to adhere to the directive; even assuming that the challenged conduct involves an element of judgment, such conduct is protected only if that judgment is of the kind that the discretionary func-

tion exception was designed to shield; because the purpose of the exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort, the exception protects only governmental actions and decisions that are based on considerations of public policy; thus, in determining whether the FTCA applies in a given case, a court must first inquire whether the challenged actions were discretionary or were instead controlled by mandatory statutes or regulations.

Claims § 12 — Federal Tort Claims Act — discretionary function exception — operational activities

5a, 5b. For purposes of the discretionary function exception to the Federal Government's liability under the Federal Tort Claims Act (28 USCS § 2680(a)), discretionary conduct is not confined to the policy or planning level; it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case; thus, a United States Court of Appeals errs in holding that decisions made by federal regulators at the operational or management level of a savings and loan association, which decisions were made after the regulators assumed a supervisory role in the association's day-to-day affairs, must necessarily have been outside the scope of the discretionary function exception. (Scalia, J., dissented in part from this holding.)

Claims § 12 — Federal Tort Claims Act — discretionary function exception — planning-level decisions

6. The discretionary function exception of the Federal Tort Claims Act (28 USCS § 2680(a)) protects a federal agency's planning-level decisions establishing programs, where Congress has delegated the authority to an independent agency or the executive branch to implement the general provisions of a regulatory statute and to issue regulations to that end; under such circumstances, the discretionary function exception also protects (1) the promulgation of regulations by which the agencies are to carry out the programs, and (2) the actions of government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations.

Claims § 12; Evidence § 247 — Federal Tort Claims Act — discretionary function exception — presumption as to policy

7a, 7b. Under the discretionary function exception of the Federal Tort Claims Act (28 USCS § 2680(a)), the Federal Government is protected where a regulation mandates particular conduct and the government's employee obeys the direction, since the action is deemed in furtherance of the policies which led to the promulgation of the regulation; if the employee violates the mandatory regulation, there is no shelter from liability, because there is no room for choice and the action is thus contrary to policy; on the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulation; thus, when established governmental policy—as ex-

pressed or implied by statute, regulation, or agency guidelines—allows a Federal Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when the agent exercises that discretion.

Claims § 12 — Federal Tort Claims Act — discretionary function exception — regulatory purposes

8a, 8b. Discretionary acts performed by a Federal Government agent within the scope of the agent's employment are not within the discretionary function exception to the Federal Government's liability under the Federal Tort Claims Act (28 USCS § 2680(a)), where such acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish; thus, if a federal official drives an automobile on a mission connected with official duties and negligently collides with another car, the discretionary function exception does not apply.

Appeal §§ 1293, 1322 — dismissal of complaint — acceptance of allegations

9. On certiorari to review a United States Court of Appeals decision that was entered on a motion to dismiss a complaint filed in Federal District Court under the Federal Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.), the United States Supreme Court will (1) accept as true all the factual allegations in the complaint, and (2) ask whether the allegations state a claim sufficient to survive a motion to dismiss.

SYLLABUS BY REPORTER OF DECISIONS

When the events in this case occurred, the Home Owners' Loan Act of 1933 authorized the Federal Home Loan Bank Board (FHLBB) to prescribe rules and regulations providing "for the organization, incorporation, examination, and regulation" of federal savings and loan associations, and to issue charters, "giving primary consideration to the best practices of thrift institutions in the United States." 12 USC § 1464(a) [12 USCS § 1464(a)]. Pursuant to the Act, the FHLBB and the Federal Home Loan Bank-Dallas (FHLB-D) undertook to advise about and oversee certain aspects of the operation of Independent American Savings Association (IASA), but instituted no formal action against the institution. At their request, respondent Gaubert, chairman of the board and IASA's largest stockholder, removed himself from IASA's management and posted security for his personal guarantee that IASA's net worth would exceed regulatory minimums. When the regulators threatened to close IASA unless its management and directors resigned, new management and directors were recommended by FHLB-D. Thereafter, FHLB-D became more involved in IASA's day-to-day business, recommending the hiring of a certain consultant to advise it on operational and financial matters; advising it concerning whether, when, and how its subsidiaries should be placed into bankruptcy; mediating salary disputes; reviewing the draft of a complaint to be used in litigation; urging it to convert from state to federal charter; and intervening when the state savings and loan department attempted to install a supervisory agent at IASA. The new directors soon announced that IASA had a substantial negative net worth, and the Federal Savings and Loan Insur-

ance Corporation (FSLIC) assumed receivership of the institution. After his administrative tort claim was denied, Gaubert filed an action in the District Court against the United States under the Federal Tort Claims Act (FTCA), seeking damages for the lost value of his shares and for the property forfeited under his personal guarantee on the ground that the FHLBB and FHLB-D had been negligent in carrying out their supervisory activities. The court granted the Government's motion to dismiss on the ground that the regulators' actions fell within the discretionary function exception to the FTCA, 28 USC § 2680(a) [28 USCS § 2680(a)]. The Court of Appeals reversed in part. Relying on Indian Towing Co. v United States, 350 US 61, 100 L Ed 48, 76 S Ct 122, the court found that the claims concerning the regulators' activities after they assumed a supervisory role in IASA's day-to-day affairs were not "policy decisions," which fall within the exception, but were "operational actions," which do not.

Held:

1. The discretionary function exception covers acts involving an element of judgment or choice if they are based on considerations of public policy. It is the nature of the conduct rather than the status of the actor that governs whether the exception applies. In addition to protecting policymaking or planning functions and the promulgation of regulations to carry out programs, the exception also protects Government agents' actions involving the necessary element of choice and grounded in the social, economic, or political goals of a statute and regulations. If an employee obeys the direction of a mandatory regulation, the Government will be protected because the action will be deemed in furtherance of the policies which led to the regulation's promulgation; and if an employee violates a mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, there is a strong presumption that the agent's acts are grounded in policy when exercising that discretion.

2. The Court of Appeals erred in holding that the discretionary function exception does not reach decisions made at the operational or management level of IASA. There is nothing in the description of a discretionary act that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs regularly requires judgment as to which of a range of permissive courses is the wisest. Neither Dalehite v United States, 346 US 15, 97 L Ed 1427, 73 S Ct 956, Indian Towing, supra, nor Berkovitz v United States, 486 US 531, 100 L Ed 2d 531, 108 S Ct 1954, supports Gaubert's and the Court of Appeals' position that there is a dichotomy between discretionary functions and operational activities.

3. The Court of Appeals erred in holding that some of the acts alleged in Gaubert's Amended Complaint were not discretionary acts within the meaning of § 2680(a). The challenged actions did not go beyond "normal regulatory activity." They were discretionary, since there were no formal regulations governing the conduct in question, and since the

relevant statutory provisions left to the agency's judgment when to institute proceedings against a financial institution and which mechanism to use. Although the statutes provided only for formal proceedings, they did not prevent regulators from supervising IASA by informal means, a view held by the FHLBB, FHLBB Resolution No. 82-381. Gaubert's argument that the actions fall outside the exception because they involved the mere application of technical skills and business expertise was rejected when the rationale of the Court of Appeals' decision was disapproved. The FHLBB's Resolution, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators undertook day-to-day operational decisions. Each of the regulators' actions was based on public policy considerations related either to the protection of the FSLIC's insurance fund or to federal oversight of the thrift industry. Although the regulators used the power of persuasion to accomplish their goals, neither the pervasiveness of their presence nor the forcefulness of their recommendations is sufficient to alter their actions' supervisory nature.

885 F2d 1284, reversed and remanded.

White, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Marshall, Blackmun, Stevens, O'Connor, Kennedy, and Souter, JJ., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment.

APPEARANCES OF COUNSEL

Stuart M. Gerson argued the cause for petitioner.

Abbe David Lowell argued the cause for respondent.

Briefs of Counsel, p 768, infra.

OPINION OF THE COURT

[499 US 317]

Justice **White** delivered the opinion of the Court.

[1a, 2a, 3a] When the events in this case occurred, the Home Owners' Loan Act of 1933, 12 USC §§ 1461-1470 [12 USCS §§ 1461-1470],[1] provided for the

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chartering and regulation of federal savings and loan associations (FSLA's). Section 1464(a) authorized the Federal Home Loan Bank Board (FHLBB) "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of FSLA's, and to issue charters, "giving primary consideration to the best practices of thrift institutions in the United States."[2]

1. Subsequent to the events at issue here, and in response to the current crisis in the thrift industry, Congress enacted comprehensive changes to the statutory scheme concerning thrift regulation by means of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub L 101-73, 103 Stat 183. FIRREA abolished the FHLBB and the Federal Savings and Loan Insurance Corporation (FSLIC), two of the agencies at issue here, and repealed the statutory provisions governing those agencies' conduct. §§ 401, 407, 103 Stat 354-357, 363. At the same time, it granted to the Federal Deposit Insurance Corporation (FDIC) and the newly established Office of Thrift Supervision discretionary enforcement authority similar to that enjoyed by the former agencies. §§ 201, 301, 103 Stat 187-188, 277-343.

2. Section 1464(a) stated in full:

"In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under

In this case the FHLBB and the Federal Home Loan Bank-Dallas (FHLB-D)[3] undertook to advise about and oversee certain aspects of the operation of a thrift institution. Their conduct in this respect was challenged by a suit against the United States under the Federal Tort Claims Act, 28 USC §§ 1346(b), 2671 et seq. [28 USCS §§ 1346(b), 2671 et seq.] (FTCA),[4] asserting that the FHLBB and FHLB-D had been negligent in carrying out their supervisory activities. The question before us is whether certain actions taken by the FHLBB and

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FHLB-D are within the "discretionary function" exception to the liability of the United States under the FTCA. The Court of Appeals for the Fifth Circuit answered this question in the negative. We have the contrary view and reverse.

I

This FTCA suit arises from the supervision by federal regulators of the activities of Independent American Savings Association (IASA), a Texas-chartered and federally insured savings and loan. Respondent Thomas M. Gaubert was IASA's chairman of the board and largest shareholder. In 1984, officials at the FHLBB sought to have IASA merge with Investex Savings, a failing Texas thrift. Because the FHLBB and FHLB-D were concerned about Gaubert's other financial dealings, they requested that he sign a "neutralization agreement" which effectively removed him from IASA's management. They also asked him to post a $25 million interest in real property as security for his personal guarantee that IASA's net worth would exceed regulatory minimums. Gaubert agreed to both conditions. Federal officials then provided regulatory and financial advice to enable IASA to consummate the merger with Investex. Throughout this period, the regulators instituted no formal action against IASA. Instead, they relied on the likelihood that IASA and Gaubert would follow their suggestions and advice.

In the spring of 1986, the regulators threatened to close IASA unless its management and board of directors were replaced; all of the directors agreed to resign. The new officers and directors, including the chief executive officer who was a former FHLB-D employee, were recommended by FHLB-D. After the new management took over, FHLB-D officials became more involved in IASA's day-to-day business. They recommended the hiring of a certain consultant to advise IASA on operational and financial matters;

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they

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such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing."

3. FHLB-D was one of the Federal Home Loan Banks (FHLB's) established by the FHLBB pursuant to 12 USC § 1423 [12 USCS § 1423]. The FHLBB was specifically empowered to authorize the performance by FHLB personnel of "any function" of the FHLBB, except for adjudications and the promulgation of rules and regulations. 12 USC § 1437(a) [12 USCS § 1437(a)].

4. The FTCA, subject to various exceptions, waives sovereign immunity from suits for negligent or wrongful acts of Government employees.

advised IASA concerning whether, when, and how its subsidiaries should be placed into bankruptcy; they mediated salary disputes; they reviewed the draft of a complaint to be used in litigation; they urged IASA to convert from state to federal charter; and they actively intervened when the Texas Savings and Loan Department attempted to install a supervisory agent at IASA. In each instance, FHLB-D's advice was followed.

Although IASA was thought to be financially sound while Gaubert managed the thrift, the new directors soon announced that IASA had a substantial negative net worth. On May 20, 1987, Gaubert filed an administrative tort claim with the FHLBB, FHLB-D, and FSLIC, seeking $75 million in damages for the lost value of his shares and $25 million for the property he had forfeited under his personal guarantee.[5] That same day, the FSLIC assumed the receivership of IASA. After Gaubert's administrative claim was denied six months later, he filed the instant FTCA suit in the United States District Court for the Northern District of Texas. His amended complaint sought $100 million in damages for the alleged negligence of federal officials in selecting the new officers and directors and in participating in the day-to-day management of IASA. The District Court granted the motion to dismiss filed by the United States, finding that all of the challenged actions of the regulators fell within the discretionary function exception to the FTCA, found in 28 USC § 2680(a) [28 USCS § 2680(a)].[6] No. CA 3-87-2989-T (Sept. 28, 1988), App to Pet for Cert 21a.

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The Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. 885 F2d 1284 (1989). Relying on this Court's decision in Indian Towing Co. v United States, 350 US 61, 100 L Ed 48, 76 S Ct 122 (1955), the court distinguished between "policy decisions," which fall within the exception, and "operational actions," which do not. 885 F2d, at 1287. After claiming further support for this distinction in this Court's decisions in United States v Varig Airlines, 467 US 797, 81 L Ed 2d 660, 104 S Ct 2755 (1984), and Berkovitz v United States, 486 US 531, 100 L Ed 2d 531, 108 S Ct 1954 (1988), the court explained:

> "The authority of the FHLBB and FHLB-Dallas to take the actions that were taken in this case, although not guided by regulations, is unchallenged. The FHLBB and FHLB-Dallas officials did not have regulations telling them, at every

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5. Gaubert was required by statute to seek relief from the agencies prior to filing an FTCA suit. See 28 USC § 2675 [28 USCS § 2675].

6. Citing 12 USC § 1464 [12 USCS § 1464], the court determined that the FHLBB had broad discretionary authority to regulate the savings and loan industry. Although acknowledging that most of Gaubert's allegations involved the regulators' activity prior to the date of receivership, the court stressed that had the regulators invoked their statutory authority to place IASA in receivership earlier, all of the challenged actions would have fallen within the exception. The court also pointed out that had IASA and Gaubert failed to cooperate with the regulators, receivership likely would have followed sooner. In the District Court's view, "[t]he fact that [Gaubert] cooperated when he could have refused will not give [him] a cause of action where he otherwise would have none." App to Pet for Cert 24a-25a. Moreover, because the decision to place IASA in receivership involved the exercise of discretion, the decision *no* to do so at an earlier date was necessarily discretionary as well. The court viewed the decision to supervise IASA's activities first by informal means as an extension of the discretionary decision to postpone receivership.

turn, how to accomplish their goals for IASA; this fact, however, does not automatically render their decisions discretionary and immune from FTCA suits. Only policy oriented decisions enjoy such immunity. Thus, the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in Indian Towing." 885 F2d, at 1289 (citations and footnote omitted).

In the court's view, that line was crossed when the regulators "began to advise IASA management and participate in management decisions." Id., at 1290. Consequently, the

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Court of Appeals affirmed the District Court's dismissal of the claims which concerned the merger, neutralization agreement, personal guarantee, and replacement of IASA management, but reversed the dismissal of the claims which concerned the regulators' activities after they assumed a supervisory role in IASA's day-to-day affairs. We granted certiorari, 496 US 935, 110 L Ed 2d 659, 110 S Ct 3211 (1990), and now reverse.

II

The liability of the United States under the FTCA is subject to the various exceptions contained in § 2680, including the "discretionary function" exception at issue here. That exception provides that the Government is not liable for

> "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 USC § 2680(a) [28 USCS § 2680(a)].

[4a, 5a] The exception covers only acts that are discretionary in nature, acts that "involv[e] an element of judgment or choice," Berkovitz, supra, at 536, 100 L Ed 2d 531, 108 S Ct 1954; see also Dalehite v United States, 346 US 15, 34, 97 L Ed 1427, 73 S Ct 956 (1953); and "it is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies. Varig Airlines, supra, at 813, 81 L Ed 2d 660, 104 S Ct 2755. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." Berkovitz, 486 US, at 536, 100 L Ed 2d 531, 108 S Ct 1954.

[4b] Furthermore, even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the kind that the discretionary

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function exception was designed to shield." Ibid. See Varig Airlines, 467 US, at 813, 81 L Ed 2d 660, 104 S Ct 2755. Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," id., at 814, 81 L Ed 2d 660, 104 S Ct 2755, when properly construed, the exception "protects only governmental actions and decisions based

on considerations of public policy." Berkovitz, supra, at 537, 100 L Ed 2d 531, 108 S Ct 1954.

[6] Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs. In addition, the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected.

Thus, in Dalehite, the exception barred recovery for claims arising from a massive fertilizer explosion. The fertilizer had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II. 346 US, at 19-21, 97 L Ed 1427, 73 S Ct 956. Not only was the cabinet-level decision to institute the fertilizer program discretionary, but so were the decisions concerning the specific requirements for manufacturing the fertilizer. Id., at 37-38, 97 L Ed 1427, 73 S Ct 956. Nearly 30 years later, in Varig Airlines, the Federal Aviation Administration's actions in formulating and implementing a "spot-check" plan for airplane inspection were protected by the discretionary function exception because of the agency's authority to establish safety standards for airplanes. 467 US, at 815, 81 L Ed 2d 660, 104 S Ct 2755. Actions taken in furtherance of the program were likewise protected, even if those particular actions were negligent. Id., at 820, 81 L Ed 2d 660, 104 S Ct 2755. Most recently, in Berkovitz, we examined a comprehensive regulatory

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scheme governing the licensing of laboratories to produce polio vaccine and the release to the public of particular drugs. 486 US, at 533, 100 L Ed 2d 531, 108 S Ct 1954. We found that some of the claims fell outside the exception, because the agency employees had failed to follow the specific directions contained in the applicable regulations, i. e., in those instances, there was no room for choice or judgment. Id., at 542-543, 100 L Ed 2d 531, 108 S Ct 1954. We then remanded the case for an analysis of the remaining claims in light of the applicable regulations. Id., at 544, 100 L Ed 2d 531, 108 S Ct 1954.

[7a] Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. See Dalehite, supra, at 36, 97 L Ed 1427, 73 S Ct 956. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Not all agencies issue comprehen-

sive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations. In any event, it will most often be true that the general aims and policies of the controlling statute will be evident from its text.

[7b, 8a] When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding

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that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.[7]

III

[5b] In light of our cases and their interpretation of § 2680(a), it is clear that the Court of Appeals erred in holding that the exception does not reach decisions made at the operational or management level of the bank involved in this case. A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." Varig Airlines, supra, at 813, 81 L Ed 2d 660, 104 S Ct 2755.

In Varig Airlines, the Federal Aviation Administration had devised a system of "spot-checking" airplanes. We held that not only was this act discretionary but so too were the acts of agency employees in executing the program since they had a range of discretion to exercise in deciding how to carry out the spot-check activity. 467 US, at 820, 81 L Ed 2d 660, 104 S Ct 2755. Likewise in

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Berkovitz, although holding that some acts on the operational level were not discretionary and therefore were without the exception, we recognized that other acts, if held to be discretionary on remand, would be protected. 486 US, at 545, 100 L Ed 2d 531, 108 S Ct 1954.

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7. **[8b]** There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

The Court's first use of the term "operational" in connection with the discretionary function exception occurred in Dalehite, where the Court noted that "[t]he decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." 346 US, at 42, 97 L Ed 1427, 73 S Ct 956. Gaubert relies upon this statement as support for his argument that the Court of Appeals applied the appropriate analysis to the allegations of the amended complaint, but the distinction in Dalehite was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy.

Neither is the decision below supported by Indian Towing. There the Coast Guard had negligently failed to maintain a lighthouse by allowing the light to go out. The United States was held liable, not because the negligence occurred at the operational level but because making sure the light was operational "did not involve any permissible exercise of policy judgment." Berkovitz, 486 US, at 538, n 3, 100 L Ed 2d 531, 108 S Ct 1954. Indeed, the Government did not even claim the benefit of the exception but unsuccessfully urged that maintaining the light was a governmental function for which it could not be liable. The Court of Appeals misinterpreted Berkovitz's reference to Indian Towing as perpetuating a nonexistent dichotomy between discretionary functions and operational activities. 885 F2d, at 1289. Consequently, once the court determined that some of the actions challenged by Gaubert occurred at an operational level, it concluded, incorrectly, that those actions must necessarily have been outside the scope of the discretionary function exception.

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IV

[9] We now inquire whether the Court of Appeals was correct in holding that some of the acts alleged in Gaubert's amended complaint were not discretionary acts within the meaning of § 2680(a). The decision we review was entered on a motion to dismiss. We therefore "accept all of the factual allegations in [Gaubert's] complaint as true" and ask whether the allegations state a claim sufficient to survive a motion to dismiss. Berkovitz, supra, at 540, 100 L Ed 2d 531, 108 S Ct 1954.

[2b] The Court of Appeals dismissed several of the allegations in the amended complaint on the ground that the challenged activities fell within the discretionary function exception. These allegations concerned "the decision to merge IASA with Investex and seek a neutralization agreement from Gaubert," as well as "the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision." 885 F2d, at 1290. Gaubert has not challenged this aspect of the court's ruling. Consequently, we review only those allegations in the amended complaint which the Court of Appeals viewed as surviving the Government's motion to dismiss.

These claims asserted that the regulators had achieved "a constant federal presence" at IASA. App 14, ¶ 33. In describing this presence, the

amended complaint alleged that the regulators "consult[ed] as to day-to-day affairs and operations of IASA," id., at 14, ¶ 33a; "participated in management decisions" at IASA board meetings, id., at 14, ¶ 33b; "became involved in giving advice, making recommendations, urging, or directing action or procedures at IASA," id., at 14, ¶ 33c; and "advised their hand-picked directors and officers on a variety of subjects," id., at 14, ¶ 34. Specifically, the complaint enumerated seven instances or kinds of objectionable official involvement. First, the regulators "arranged for the hiring for IASA of . . . consultants on operational and financial matters and asset management." Id., at 14, ¶ 34a. Second,

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the officials "urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered savings and loan in part so that it could become the exclusive government entity with power to control IASA." Id., at 14, ¶ 34b. Third, the regulators "gave advice and made recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy." Id., at 15, ¶ 34c. Fourth, the officials "mediated salary disputes between IASA and its senior officers." Id., at 15, ¶ 34d. Fifth, the regulators "reviewed a draft complaint in litigation" that IASA's board contemplated filing and were "so actively involved in giving advice, making recommendations, and directing matters related to IASA's litigation policy that they were able successfully to stall the Board of Directors' ultimate decision to file the complaint until the Bank Board *in* Washington had reviewed, advised on, and commented on the draft." Id., at 15, ¶ 34e (emphasis in original). Sixth, the regulators "actively intervened with the Texas Savings and Loan Department (IASA's principal regulator) when the State attempted to install a supervisory agent at IASA." Id., at 15, ¶ 34f. Finally, the FHLB-D president wrote the IASA board of directors "affirming that his agency had placed that Board of Directors into office, and describing their mutual goal to protect the FSLIC insurance fund." Id., at 15-16, ¶ 34g. According to Gaubert, the losses he suffered were caused by the regulators' "assumption of the duty to participate in, and to make, the day-to-day decisions at IASA and [the] negligent discharge of that assumed duty." Id., at 17, ¶ 39. Moreover, he alleged that "[t]he involvement of the FHLB-Dallas in the affairs of IASA went beyond its normal regulatory activity, and the agency actually substituted its decisions for those of the directors and officers of the association." Id., at 19, ¶ 55.

[2c, 4c] We first inquire whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations. Berkovitz, supra, at 536, 100 L Ed 2d 531, 108 S Ct 1954.

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Although the FHLBB, which oversaw the other agencies at issue, had promulgated extensive regulations which were then in effect, see 12 CFR §§ 500-591 (1986), neither party has identified formal regulations governing the conduct in question. As already noted, 12 USC § 1464(a) [12 USCS § 1464(a)] authorizes the FHLBB to examine and regulate FSLA's, "giving primary consideration to the best practices of thrift institutions in the United States." Both the District Court and the Court of Appeals recognized that the agencies possessed broad statu-

tory authority to supervise financial institutions.[8] The relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use. For example, the FSLIC had authority to terminate an institution's insured status, issue cease-and-desist orders, and suspend or remove an institution's officers, if "in the opinion of the Corporation" such action was warranted because the institution or its officers were engaging in an "unsafe or unsound practice" in connection with the business of the institution. 12 USC §§ 1730(b)(1), (e)(1), (g)(1) [12 USCS §§ 1730(b)(1), (e)(1), (g)(1)]. The FHLBB had parallel authority to issue cease-and-desist orders and suspend or remove an institution's officers. §§ 1464(d)(2)(A), (d)(4)(A). Although the statute enumerated specific grounds warranting an appointment by the FHLBB of a conservator or receiver, the determination of whether any of these grounds existed depended upon "the opinion of the Board." § 1464(d)(6)(A). The agencies here were not bound to act in a particular way; the exercise of their authority involved a great "element of judgment or choice." Berkovitz, supra, at 536, 100 L Ed 2d 531, 108 S Ct 1954.

[2d] We are unconvinced by Gaubert's assertion that because the agencies did not institute formal proceedings against IASA, they had no discretion to take informal actions as they

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did. Although the statutes provided only for formal proceedings, there is nothing in the language or structure of the statutes that prevented the regulators from invoking less formal means of supervision of financial institutions. Not only was there no statutory or regulatory mandate which compelled the regulators to act in a particular way, but there was no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation.

This is the view of the FHLBB; for in a resolution passed in 1982, the FHLBB adopted "a formal statement of policy regarding the Bank Board's use of supervisory actions," which provided in part:

> "In carrying out its supervisory responsibilities with respect to thrift institutions insured by the Federal Savings and Loan Insurance Corporation ('FSLIC'), . . . it is the policy of the Federal Home Loan Bank Board that violations of law or regulation, and unsafe or unsound practices will not be tolerated and will result in the initiation of strong supervisory and/or enforcement action by the Board. It is the Bank Board's goal to minimize, and where possible, to prevent losses occasioned by violations or unsafe and unsound practices by taking prompt and effective supervisory action. . . .
>
> "The Board recognizes that supervisory actions must be tailored to each case, and that such actions will vary according to the severity of the violation of law or regulation or the unsafe or unsound practice, as well as to the responsiveness and willingness of the association to take corrective action. The following guidance should be

8. As explained above, the agencies at issue here have since been abolished, although they have been replaced by agencies possessing similar discretionary authority. See n 1, supra.

considered for all supervisory actions.

"In each case, based upon an assessment of management's willingness to take appropriate corrective action and the potential harm to the institution if corrective action is not effected, the staff must weigh the appropriateness of available supervisory actions. If the potential harm is slight and there is a substantial probability

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that management will correct the situation, informal supervisory guidance and oversight is appropriate. If some potential harm to the institution or its customers is likely, a supervisory agreement should be promptly negotiated and implemented. If substantial financial harm may occur to the institution, its customers, or the FSLIC and there is substantial doubt that corrections will be made promptly, a cease-and-desist order should be sought immediately through the Office of General Counsel." FHLBB Resolution No. 82-381 (May 26, 1982), reprinted in Brief for Respondent 4a-6a.

From this statement it is clear that the regulators had the discretion to supervise IASA through informal means, rather than invoke statutory sanctions.[9]

Gaubert also argues that the challenged actions fall outside the discretionary function exception because they involved the mere application of technical skills and business expertise. Brief for Respondent 33. But this is just another way of saying that the considerations involving the day-to-day management of a business concern such as IASA are so precisely formulated that decisions at the operational level never involve the exercise of discretion within the meaning of § 2680(a), a notion that we have already rejected in disapproving the rationale of the Court of Appeals' decision. It may be that certain decisions resting on mathematical calculations, for example, involve no choice or judgment in carrying out the calculations, but the regulatory acts alleged here are not of that genre. Rather, it is plain to us that each of the challenged actions involved the exercise of choice and judgment.

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[1b, 3b] We are also convinced that each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield. The FHLBB Resolution quoted above, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators exercised their discretion to choose from various courses of action in supervising IASA. Although Gaubert contends that day-to-day decisions concerning IASA's affairs did not implicate social, economic, or political policies, even the Court of Appeals recognized that these day-to-day "operational" decisions were undertaken for policy reasons of primary concern to the regulatory agencies:

"[T]he federal regulators here had two discrete purposes in mind as

9. We note that in a recent opinion by Judge Garza, who also wrote the opinion at issue here, the Court of Appeals for the Fifth Circuit refused to extend its decision in Gaubert to impose liability on the FDIC for failure to institute statutory receivership proceedings against a thrift. See Federal Deposit Insurance Corp. v Mmahat, 907 F2d 546, 552 (CA5 1990).

> they commenced day-to-day operations at IASA. First, they sought to protect the solvency of the savings and loan industry at large, and maintain the public's confidence in that industry. Second, they sought to preserve the assets of IASA for the benefit of depositors and shareholders, of which Gaubert was one." 885 F2d, at 1290.

Consequently, Gaubert's assertion that the day-to-day involvement of the regulators with IASA is actionable because it went beyond "normal regulatory activity" is insupportable.

[3c] We find nothing in Gaubert's amended complaint effectively alleging that the discretionary acts performed by the regulators were not entitled to the exemption. By Gaubert's own admission, the regulators replaced IASA's management in order to protect the FSLIC's insurance fund; thus it cannot be disputed that this action was based on public policy considerations. The regulators' actions in urging IASA to convert to federal charter and in intervening with the state agency were directly related to public policy considerations regarding federal oversight of the thrift industry. So were advising the hiring of a financial consultant, advising when to place IASA subsidiaries into bankruptcy, intervening on IASA's

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behalf with Texas officials, advising on litigation policy, and mediating salary disputes. There are no allegations that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the statutes.

[1c] There is no doubt that in advising IASA the regulators used the power of persuasion to accomplish their goals. Nevertheless, we long ago recognized that regulators have the authority to use such tactics in supervising financial institutions. In United States v Philadelphia Nat. Bank, 374 US 321, 10 L Ed 2d 915, 83 S Ct 1715 (1963), the Court considered the wide array of supervisory tools available to the Federal Deposit Insurance Corporation and the Federal Reserve System in overseeing banks. Noting the "frequent and intensive" nature of bank examinations and the "detailed periodic reports" banks were required to submit, the Court found that "the agencies maintain virtually a day-to-day surveillance of the American banking system." Id., at 329, 10 L Ed 2d 915, 83 S Ct 1715. Moreover, the agencies' ability to terminate a bank's insured status and invoke other less drastic sanctions meant that "recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings." Id., at 330, 10 L Ed 2d 915, 83 S Ct 1715. These statements apply with equal force to supervision by federal agencies of the savings and loan industry. More than 30 years ago, the Court of Appeals for the Fifth Circuit made similar observations in a case involving allegations that the FHLBB had improperly pressured a savings and loan's directors to resign. See Miami Beach Federal Savings & Loan Association v Callander, 256 F2d 410 (CA5 1958). The court noted that "[w]hen a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace the management . . . , it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of

the statutory powers and discretion of the agency." Id., at 414-415. Consequently, neither the pervasiveness of the regulators' presence at IASA nor the forcefulness of their

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recommendations is sufficient to alter the supervisory nature of the regulators' actions.

In the end, Gaubert's Amended Complaint alleges nothing more than negligence on the part of the regulators. Indeed, the two substantive counts seek relief for "negligent selection of directors and officers" and "negligent involvement in day-to-day operations." App 17, 18. Gaubert asserts that the discretionary function exception protects only those acts of negligence which occur in the course of establishing broad policies, rather than individual acts of negligence which occur in the course of day-to-day activities. Brief for Respondent 39. But we have already disposed of that submission. See supra, at 325, 113 L Ed 2d, at 348. If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable. This is not the rule of our cases.

V

Because from the face of the amended complaint, it is apparent that all of the challenged actions of the federal regulators involved the exercise of discretion in furtherance of public policy goals, the Court of Appeals erred in failing to find the claims barred by the discretionary function exception of the FTCA. We therefore reverse the decision of the Court of Appeals for the Fifth Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice **Scalia,** concurring in part and concurring in the judgment.

I concur in the judgment and in much of the opinion of the Court. I write separately because I do not think it necessary to analyze individually each of the particular actions challenged by Gaubert, nor do I think an individualized analysis necessarily leads to the results the Court obtains.

[499 US 335]

I

The so-called discretionary function exception to the Federal Tort Claims Act (FTCA) does not protect all governmental activities involving an element of choice. Berkovitz v United States, 486 US 531, 536-537, 100 L Ed 2d 531, 108 S Ct 1954 (1988). The choice must be "grounded in social, economic, [or] political policy," United States v Varig Airlines, 467 US 797, 814, 81 L Ed 2d 660, 104 S Ct 2755 (1984), or, more briefly, must represent a "policy judgment," Berkovitz, supra, at 537, 100 L Ed 2d 531, 108 S Ct 1954. Unfortunately, lower courts have had difficulty in applying this test.

The Court of Appeals in this case concluded that a choice involves policy judgment (in the relevant sense) if it is made at a planning rather than an operational level within the

agency. 885 F2d 1284, 1287 (CA5 1989). I agree with the Court that this is wrong. I think, however, that the level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter and the office of the decision-maker. In my view a choice is shielded from liability by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations.

This test, by looking not only to the decision but also to the officer who made it, recognizes that there is something to the planning vs operational dichotomy—though the "something" is not precisely what the Court of Appeals believed. Ordinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions. The dock foreman's decision to store bags of fertilizer in a highly compact fashion is not protected by this exception because, even if he carefully calculated considerations of cost to the Government versus safety, it was not his responsibility to ponder such things; the Secretary of Agriculture's decision to the same

[499 US 336]

effect *is* protected, because weighing those considerations is his task. Cf. Dalehite v United States, 346 US 15, 97 L Ed 1427, 73 S Ct 956 (1953). In Indian Towing Co. v United States, 350 US 61, 100 L Ed 48, 76 S Ct 122 (1955), the United States was held liable for, among other things, the failure of Coast Guard maintenance personnel adequately to inspect electrical equipment in a lighthouse; though there could conceivably be policy reasons for conducting only superficial inspections, the decisions had been made by the maintenance personnel, and it was assuredly not their responsibility to ponder such things. This same factor explains why it is universally acknowledged that the discretionary function exception never protects against liability for the negligence of a vehicle driver. See ante, at 325, n 7, 113 L Ed 2d, at 348. The need for expedition vs. the need for safety may well represent a policy choice, cf. Dalehite, supra, but the Government does not expect its drivers to make that choice on a case-by-case basis.

Moreover, not only is it necessary for application of the discretionary function exception that the decisionmaker be an official who possesses the relevant policy responsibility, but also the decisionmaker's close identification with policymaking can be strong evidence that the other half of the test is met—i. e., that the subject matter of the decision is one that ought to be informed by policy considerations. I am much more inclined to believe, for example, that the manner of storing fertilizer raises economic policy concerns if the decision on that subject has been reserved to the Secretary of Agriculture himself. That it is proper to take the level of the decisionmaker into account is supported by the phrase of the FTCA immediately preceding the discretionary function exception, which excludes governmental liability for acts taken, " 'exercising due care, in the execution of a . . . regulation, whether or not such . . . regulation be valid.' " Dalehite, 346 US, at 18, 97 L Ed 1427, 73 S Ct 956. We have taken this to mean that regula-

tions "[can] not be attacked by claimants under the Act." Id., at 42, 97 L Ed 1427, 73 S Ct 956. This immunity represents an absolute statutory presumption,

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so to speak, that all regulations involve policy judgments that must not be interfered with. I think there is a similar presumption, though not an absolute one, that decisions reserved to policymaking levels involve such judgments—and the higher the policymaking level, the stronger the presumption.

II

Turning to the facts of the present case, I find it difficult to say that the particular activities of which Gaubert complains are necessarily discretionary functions, so that a motion to dismiss could properly be granted on that ground. To take but one example, Gaubert alleges that the regulators acted negligently in selecting consultants to advise the bank. The Court argues that such a decision, even though taken in the course of "day-to-day" management, surely involves an element of choice. But that answers only the first half of the Berkovitz inquiry. It remains to be determined whether the choice is of a policymaking nature. Perhaps one can imagine a relatively high-level Government official, authorized generally to manage the bank in such fashion as to further applicable Government policies, who hires consultants and other employees with those policy objectives in mind. The discretionary function exception arguably *would* protect such a hiring choice. But one may also imagine a federal officer of relatively low level, authorized to hire a bank consultant by applying ordinary standards of business judgment, and not authorized to consider matters of Government policy in the process. That hiring decision would not be protected by the discretionary function exception, even though some element of choice is involved.

I do not think it advances the argument to observe, ante, at 333, 113 L Ed 2d, at 353, that "[t]here are no allegations that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the statutes." An official may act "within the purview" of the relevant policy without himself making policy decisions—in which case, if the action is

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negligent (and was not specifically mandated by the relevant policy, see Dalehite, supra, at 36, 97 L Ed 1427, 73 S Ct 956), the discretionary function exception does not bar United States liability. Contrariwise, action "outside the purview" of the relevant policy does not necessarily fail to qualify for the discretionary function defense. If the action involves policy discretion, and the officer is authorized to exercise that discretion, the defense applies even if the discretion has been exercised erroneously, so as to frustrate the relevant policy. See 28 USC § 2680(a) [28 USCS § 2680(a)] (discretionary function exception applies "whether or not the discretion involved be abused"). In other words, action "within the purview" of the relevant policy is neither a necessary nor a sufficient condition for invoking the discretionary function exception.

The present case comes to us on a motion to dismiss. Lacking any sort of factual record, we can do little more than speculate as to whether the officers here exercised policymaking responsibility with respect

to the individual acts in question. Without more, the motion would have to be denied. I think, however, that the Court's conclusion to the contrary is properly reached under a slightly different approach. The alleged misdeeds complained of here were not actually committed by federal officers. Rather, federal officers "recommended" that such actions be taken, making it clear that if the recommendations were not followed the bank would be seized and operated directly by the regulators. In effect, the Federal Home Loan Bank Board (FHLBB) imposed the advice which Gaubert challenges as a condition of allowing the bank to remain independent. But surely the decision whether or not to take over a bank is a policy-based decision to which liability may not attach—a decision that ought to be influenced by considerations of "social, economic, [or] political policy," Varig Airlines, 467 US, at 814, 81 L Ed 2d 660, 104 S Ct 2755, and that in the nature of things can only be made by FHLBB officers responsible for weighing such considerations. I think a corollary is that setting the *conditions* under which the

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FHLBB will or will not take over a bank is an exercise of policymaking discretion. By establishing such a list of conditions, as was done here, the Board in effect announces guidelines pursuant to which it will exercise its discretionary function of taking over the bank. Establishing guidelines for the exercise of a discretionary function is unquestionably a discretionary function. Thus, without resort to item-by-item analysis, I would find each of Gaubert's challenges barred by the discretionary function exception.

[499 US 340]

FEIST PUBLICATIONS, INC., Petitioner

v

RURAL TELEPHONE SERVICE COMPANY, INC.

499 US 340, 113 L Ed 2d 358, 111 S Ct 1282

[No. 89-1909]

Argued January 9, 1991. Decided March 27, 1991.

Decision: Alphabetical listings of names, accompanied by towns and telephone numbers, in telephone book white pages held not copyrightable; thus, nonconsensual copying of listings held not to infringe on copyright.

SUMMARY

A telephone company that was a certified public utility providing telephone service to several communities in Kansas, and that was subject to a state regulation requiring all telephone companies operating in the state to issue annually an updated telephone directory, published a typical telephone directory, consisting of white pages and yellow pages. The white pages listed in alphabetical order the names of the telephone company's subscribers, together with their towns and telephone numbers. The telephone company obtained the data for its white pages from the company's subscribers, who were required to provide their names and addresses when applying for telephone service from the company. A publishing company, which specialized in areawide telephone directories covering a much larger geographical range than did directories such as that of the telephone company, offered to pay the telephone company for the right to use its white pages listings, but the telephone company refused to license its listings to the publishing company. Subsequently, the publishing company used the telephone company's white pages listings without the telephone company's consent. Although the publishing company sought to obtain additional information, such as street addresses, for the listings that it took from the telephone company's white pages, many of the listings in the publishing company's areawide directory that covered part of the telephone company's service area were identical to listings in the telephone company's white pages. In a copyright infringement suit brought by the telephone company against the publishing company, the United States District Court for the

SUBJECT OF ANNOTATION

Beginning on page 771, infra

Supreme Court's views as to when books or other written or printed materials are copyrightable under federal law

Briefs of Counsel, p 768, infra.

District of Kansas, explaining that courts had consistently held that telephone directories were copyrightable, granted summary judgment to the telephone company (663 F Supp 214). The United States Court of Appeals for the Tenth Circuit, in an unpublished opinion, affirmed the District Court judgment for substantially the reasons given by the District Court (916 F2d 718).

On certiorari, the United States Supreme Court reversed. In an opinion by O'CONNOR, J., joined by REHNQUIST, Ch. J., and WHITE, MARSHALL, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., it was held that (1) the names, towns, and telephone numbers listed in the white pages were not protected by the telephone company's copyright in its combined white and yellow pages directory, because the listings in the white pages were not original to the telephone company, since (a) the listings, rather than owing their origin to the telephone company, were uncopyrightable facts, and (b) the telephone company has not selected, coordinated, or arranged these uncopyrightable facts in an original way sufficient to satisfy the minimum standards for copyright protection—under either the Federal Constitution's Article I, § 8, cl 8, which authorizes Congress to secure for limited times to authors the exclusive right to their respective writings, or the Copyright Act of 1976 (17 USCS §§ 101 et seq.), which provides copyright protection for original works of authorship—given that the telephone company's selection and alphabetical arrangement of the listings lacked the creativity necessary to demonstrate originality; and (2) because the telephone company's white pages listings lacked the requisite originality for copyright protection, the publishing company's use of the listings could not constitute copyright infringement.

BLACKMUN, J., concurred in the judgment.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

18 Am Jur 2d, Copyright and Literary Property §§ 19, 20, 22, 42, 43, 47, 56

7 Federal Procedure, L Ed, Copyrights §§ 18:75, 18:76

6A Federal Procedural Forms, L Ed, Copyrights §§ 17:51, 17:91, 17:92

7 Am Jur Pl & Pr Forms (Rev), Copyright and Literary Property, Forms 12, 41, 42

5A Am Jur Legal Forms 2d, Copyright and Literary and Artistic Property § 72:78

50 Am Jur Proof of Facts 2d 263, Damages for Copyright Infringement

9 Am Jur Trials 293, Copyright Infringement Litigation

USCS, Constitution, Art I, § 8, cl 8; 17 USCS §§ 101 et seq.

L Ed Digest, Copyright and Literary Property §§ 3, 20

L Ed Index, Copyright and Literary Property; Directories; Telephones and Telegraphs

Index to Annotations, Copyright and Literary Property; Directories; Telecommunications

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to what constitutes copyright infringement. 78 L Ed 2d 957.

Measure of damages and profits to which copyright owner is entitled under 17 USCS § 504(b). 100 ALR Fed 258.

What constitutes a "compilation" subject to copyright protection—modern cases. 88 ALR Fed 151.

Construction and application of §§ 1(c) and 1(d) of Copyright Act (17 USCS §§ 101(c), 101(d)), providing for impounding of articles alleged to infringe copyright and for destruction of infringing copies or devices. 22 ALR Fed 487.

Requirements as to deposit of copies of work in Copyright Office under § 13 of Federal Copyright Act (17 USCS § 13) as prerequisite to infringement action. 16 ALR Fed 595.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Copyright and Literary Property § 3 — subject of copyright — telephone directory — white pages

1a-1e. Although a telephone company's combined white and yellow pages directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements, the names, towns, and telephone numbers listed alphabetically according to name in the directory's white pages are not protected by the copyright in the directory, because the listings in the white pages are not original to the telephone company, since (1) the names, towns, and telephone numbers, rather than owing their origin to the telephone company, are uncopyrightable facts; and (2) the telephone company has not selected, coordinated, or arranged these uncopyrightable facts in an original way sufficient to satisfy the minimum standards for copyright protection—under either the Federal Constitution's Article I, § 8, cl 8, which authorizes Congress to secure for limited times to authors the exclusive right to their respective writings, or the Copyright Act of 1976 (17 USCS §§ 101 et seq.), which provides copyright protection for original works of authorship—given that (a) the telephone company's selection of listings—the name, town, and telephone number of each of the company's subscribers—lacks the modicum of creativity necessary to transform mere selection into copyrightable expression, and (b) there is nothing remotely creative about arranging names alphabetically in a white pages directory.

[See annotation p 771, infra]

Copyright and Literary Property § 20 — infringement — telephone directory — white pages

2a, 2b. The nonconsensual copying, by a publishing company into its areawide telephone directory, of white pages listings from a combined white and yellow pages telephone directory published by a telephone company that serves part of the area covered by the areawide directory, cannot constitute copyright infringement, where the United States Supreme Court has determined that the telephone company's white pages listings lack the requisite originality to be protected by the copyright in the telephone company's combined white and yellow pages directory.

Copyright and Literary Property § 3 — subject of copyright — facts

3a-3g. Facts are not copyrightable, because (1) the Federal Constitution's Article I, § 8, cl 8—which authorizes Congress to secure for limited times to authors the exclusive right to their respective writings—mandates that a work must be original to the author in order to qualify for copyright protection, and (2) no one may claim originality as to facts, since facts do not owe their origin to an act of authorship, given that the first person to find and report a particular fact has not created the fact, but has merely discovered its existence.

[See annotation p 771, infra]

Copyright and Literary Property § 3 — subject of copyright — factual compilations — original selection or arrangement

4a-4d. Factual compilations generally are copyrightable, because factual compilations may possess the

originality required by the Federal Constitution's Article I, § 8, cl 8—which authorizes Congress to secure for limited times to authors the exclusive right to their respective writings—for copyright protection, since (1) the compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers, and (2) these choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws; thus, even a directory that contains absolutely no protectable written expression, but only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement; but, as a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.

[See annotation p 771, infra]

Copyright and Literary Property § 3 — subject of copyright — originality — novelty

5a, 5b. The term "original," as it is used in copyright—where the United States Supreme Court has held that to qualify for copyright protection, a work must be original to the author—means only that the work was independently created by the author, as opposed to copied from other works, and that it possesses at least some minimal degree of creativity; because originality does not signify novelty, a work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying; thus, if two poets, each ignorant of the other, compose identical poems, although neither work is novel, both are original and, hence, copyrightable.

[See annotation p 771, infra]

Copyright and Literary Property § 3 — subject of copyright — facts — census data — originality

6. Census data do not trigger copyright, because census data are not original in the constitutional sense—where the United States Supreme Court has held that the Federal Constitution's Article I, § 8, cl 8, which authorizes Congress to secure for limited times to authors the exclusive right to their respective writings, mandates originality as a prerequisite for copyright protection—since census takers, rather than creating the population figures that emerge from their efforts, in a sense copy these figures from the world around them; the same is true of all facts—scientific, historical, biographical, and news of the day.

[See annotation p 771, infra]

Copyright and Literary Property §§ 3, 20 — subject of copyright — facts — factual compilations — infringement

7a, 7b. Although a factual compilation is eligible for copyright if it features an original selection or arrangement of facts, and although a compilation author who clothes facts with an original collocation of words may be able to claim a copyright in this written expression, others may copy from the publication the underlying facts but not the precise words used to present them, because (1) the copyright is limited to the particular selection or arrangement, and (2) in no event may copyright extend to the facts themselves, since, no matter how original the format of the selection or arrangement, the facts do not become original through asso-

ciation; thus, notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.

[See annotation p 771, infra]

Copyright and Literary Property § 1 — copyright — constitutional requirement — primary objective

8. That much of the fruit of a factual compiler's labor may be used by others without compensation is the essence of copyright and is required by the Federal Constitution's Article I, § 8, cl 8—which authorizes Congress to secure for limited times to authors the exclusive right to their respective writings—because the primary objective of copyright is not to reward the labor of authors, but to promote the progress of science and useful arts, where to this end, copyright, under the principle known as the idea/expression or fact/expression dichotomy, which applies to all works of authorship, assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

[See annotation p 771, infra]

Copyright and Literary Property § 3; Restraints of Trade, Monopolies, and Unfair Trade Practices § 94 — subject of copyright — ideas and facts — "sweat of the brow" doctrine — unfair competition

9. Although protection for facts and ideas that are the fruits of an author's research may in certain circumstances be available under a theory of unfair competition, to accord copyright protection on the basis of the doctrine known as "sweat of the brow" or "industrious collection"—the underlying notion of which is that copyright is a reward for the hard work that goes into compiling facts—distorts basic copyright principles, in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of writings by authors, where (1) the most fundamental axiom of basic copyright principles is that no one may copyright facts or ideas, and (2) it is just such wasted effort that would result from relying on facts contained in prior works that the proscription against the copyright of ideas and facts is designed to prevent.

[See annotation p 771, infra]

Copyright and Literary Property § 3; Statutes §§ 147, 164, 181 — subject of copyright — collections of facts

10a-10c. The purpose of the definition of "compilation" in § 101 of the Copyright Act of 1976 (17 USCS § 101)—which defines a compilation in the copyright sense as a work formed by the collection and assembly of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship—is to emphasize that collections of facts are not copyrightable per se; this message is conveyed through § 101's structure identifying three distinct elements required to be met for a work to qualify as a copyrightable compilation—(1) collection and assembly of pre-existing material, (2) selection, coordination, or arrangement of the material, and (3) originality based on selection, coordination, or arrangement; the plain language of § 101 indicates that not every collection of facts receives

copyright protection, since otherwise there would be a period in § 101 after the word "data"; as explained in House and Senate Reports, the goal of § 101's requirement for a copyrightable compilation—that the compilation be an original work of authorship—is to make plain that the criteria of copyrightable subject matter stated in § 102 of the Act (17 USCS § 102)—which states that the originality requirement applies to all works—apply with full force to works containing pre-existing material; and § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality.

[See annotation p 771, infra]

Copyright and Literary Property §§ 3, 20 — subject of copyright — infringement — facts — factual compilations

11a, 11b. The facts contained in existing works may be freely copied, because copyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts—since (1) Congress enacted § 103 of the Copyright Act of 1976 (17 USCS § 103)—which provides that the copyright in a compilation extends to only the material contributed by the author of such work and does not imply any exclusive right in the pre-existing material employed in the work—to make clear that the copyright in a compilation does not extend to the facts themselves; (2) House and Senate Reports state that the most important point with respect to § 103 is that copyright has no effect on the public domain status of the pre-existing material; and (3) the predecessor of the Copyright Act of 1976—the Copyright Act of 1909—did not require that each subsequent compiler must start from scratch and was precluded from relying on research undertaken by another.

[See annotation p 771, infra]

Copyright and Literary Property § 3; Statutes § 164 — subject of copyright — collections of facts

12. Section 101 of the Copyright Act of 1976 (17 USCS § 101)—which defines a "compilation" in the copyright sense as a work formed by the collection and assembly of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship—envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection; because facts are never original, a compilation author can claim originality, if at all, in only the way the facts are presented; § 101 dictates that the principal focus in determining copyrightability should be on whether the selection, coordination, and arrangement of facts are sufficiently original to merit protection; if every selection, coordination, or arrangement of facts will trigger copyright, the phrase "in such a way" in § 101's definition of "compilation" is meaningless; and a court should give effect, if possible, to every clause and word of a statute.

[See annotation p 771, infra]

Copyright and Literary Property § 3; Statutes § 139 — subject of copyright — originality — revision of federal statute

13. Under the Copyright Act of 1976 (17 USCS §§ 101 et seq.) and the act that the 1976 Act revised—the Copyright Act of 1909—the touchstone of copyright protection in

directories and other fact-based works is originality, not "sweat of the brow"—the hard work that goes into compiling facts—because (1) the 1976 revisions were a direct response to the Copyright Office's concern that many lower courts had misconstrued this basic principle, (2) Congress emphasized repeatedly that the purpose of the revisions was to clarify, not change, existing law, and (3) the revisions explained in (a) § 102(a) of the 1976 Act (17 USCS § 102(a)) that copyright requires originality, (b) § 102(b) of the 1976 Act (17 USCS § 102(b)) that facts are never original, (c) § 103(b) of the 1976 Act (17 USCS § 103(b)) that a copyright in a compilation does not extend to the facts the compilation contains, and (d) in § 101 of the 1976 Act (17 USCS § 101) that a compilation is copyrightable to only the extent that it features an original selection, coordination, or arrangement.

[See annotation p 771, infra]

Copyright and Literary Property § 20 — copyright infringement — what constitutes

14. To establish copyright infringement, the two elements that must be proven are (1) ownership of a valid copyright, and (2) copying of constituent elements of a work that are original.

Copyright and Literary Property § 3 — subject of copyright — telephone directory — white pages — selection of facts

15. A telephone company's selection of listings for the white pages of the telephone directory published by the company may—where the United States Supreme Court has determined that the company's selection of listings are not original and thus not copyrightable, because the selection lacks the creativity required for copyright protection—also fail the originality requirement for copyrightability under the theory that the telephone company did not truly "select" to publish the names and telephone numbers of its subscribers, because, where the company was required to do so by a state corporation commission, one could plausibly conclude that this selection was dictated by state law, not by the telephone company.

[See annotation p 771, infra]

SYLLABUS BY REPORTER OF DECISIONS

Respondent Rural Telephone Service Company, Inc., is a certified public utility providing telephone service to several communities in Kansas. Pursuant to state regulation, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. It obtains data for the directory from subscribers, who must provide their names and addresses to obtain telephone service. Petitioner Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories covering a much larger geographic range than directories such as Rural's. When Rural refused to license its white pages listings to Feist for a directory covering 11 different telephone service areas, Feist extracted the listings it needed from Rural's directory without Rural's consent. Although Feist altered many of Rural's listings, several were identical to listings in Rural's white pages. The District Court granted summary judgment to Rural in its copyright infringement suit, holding that telephone directories are copyrightable. The Court of Appeals affirmed.

Held: Rural's white pages are not entitled to copyright, and therefore

Feist's use of them does not constitute infringement.

(a) Article I, § 8, cl 8, of the Constitution mandates originality as a prerequisite for copyright protection. The constitutional requirement necessitates independent creation plus a modicum of creativity. Since facts do not owe their origin to an act of authorship, they are not original and, thus, are not copyrightable. Although a compilation of facts may possess the requisite originality because the author typically chooses which facts to include, in what order to place them, and how to arrange the data so that readers may use them effectively, copyright protection extends only to those components of the work that are original to the author, not to the facts themselves. This fact/expression dichotomy severely limits the scope of protection in fact-based works.

(b) The Copyright Act of 1976 and its predecessor, the Copyright Act of 1909, leave no doubt that originality is the touchstone of copyright protection in directories and other fact-based works. The 1976 Act explains that copyright extends to "original works of authorship," 17 USC § 102(a) [17 USCS § 102(a)], and that there can be no copyright in facts, § 102(b). A compilation is not copyrightable per se, but is copyrightable only if its facts have been "selected, coordinated, or arranged *in such a way* that the resulting work as a whole constitutes an original work of authorship." § 101 (emphasis added). Thus, the statute envisions that some ways of selecting, coordinating, and arranging data are not sufficiently original to trigger copyright protection. Even a compilation that is copyrightable receives only limited protection, for the copyright does not extend to facts contained in the compilation. § 103(b). Lower courts that adopted a "sweat of the brow" or "industrious collection" test—which extended a compilation's copyright protection beyond selection and arrangement to the facts themselves—misconstrued the 1909 Act and eschewed the fundamental axiom of copyright law that no one may copyright facts or ideas.

(c) Rural's white pages do not meet the constitutional or statutory requirements for copyright protection. While Rural has a valid copyright in the directory as a whole because it contains some forward text and some original material in the yellow pages, there is nothing original in Rural's white pages. The raw data are uncopyrightable facts, and the way in which Rural selected, coordinated, and arranged those facts is not original in any way. Rural's selection of listings—subscribers' names, towns, and telephone numbers—could not be more obvious and lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. In fact, it is plausible to conclude that Rural did not truly "select" to publish its subscribers' names and telephone numbers, since it was required to do so by state law. Moreover, there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.

916 F2d 718, reversed.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Marshall, Stevens, Scalia, Kennedy, and Souter, JJ., joined. Blackmun, J., concurred in the judgment.

APPEARANCES OF COUNSEL

Kyler Knobbe argued the cause for petitioner.
James M. Caplinger, Jr. argued the cause for respondent.
Briefs of Counsel, p 768, infra.

OPINION OF THE COURT

[499 US 342]

Justice **O'Connor** delivered the opinion of the Court.

[1a, 2a] This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories. Unlike a typical

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directory, which covers only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings—compared to Rural's approximately 7,700 listings. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.

As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly status, and therefore lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.

Of the 11 telephone companies, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist, as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers. In a decision subsequent to that which we review here, the District Court determined that this was precisely the reason Rural refused to license its listings. The refusal was motivated by an unlawful purpose "to

extend its monopoly in telephone service to a monopoly in yellow pages advertising." Rural Telephone Service Co. v Feist Publications, Inc. 737 F Supp 610, 622 (Kan. 1990).

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees verified

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the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982-83 white pages. App 54 (¶ 15-16), 57. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural, explaining that "[c]ourts have consistently held that telephone directories are copyrightable" and citing a string of lower court decisions. 663 F Supp 214, 218 (1987). In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed "for substantially the reasons given by the district court." App to Pet for Cert 4a, judgt order reported at 916 F2d 718 (1990). We granted certiorari, 498 US 808, 112 L Ed 2d 17, 111 S Ct 40 (1990), to determine whether the copyright in Rural's directory protects the names, towns, and telephone numbers copied by Feist.

II

A

[3a, 4a] This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that

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"[n]o author may copyright his ideas or the facts he narrates." Harper & Row, Publishers, Inc. v Nation Enterprises, 471 US 539, 556, 85 L Ed 2d 588, 105 S Ct 2218 (1985). Rural wisely concedes this point, noting in its brief that "[f]acts and discoveries, of course, are not themselves subject to copyright protection." Brief for Respondent 24. At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.

There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data—i. e., wholly fac-

tual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope.

[3b, 5a] The key to resolving the tension lies in understanding why facts are not copyrightable. The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. See Harper & Row, supra, at 547-549, 85 L Ed 2d 588, 105 S Ct 2218. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. Id., § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate,

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assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. See Sheldon v Metro-Goldwyn Pictures Corp. 81 F2d 49, 54 (CA2 1936).

[3c] Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." In two decisions from the late 19th century —The Trade-Mark Cases, 100 US 82, 25 L Ed 550 (1879); and Burrow-Giles Lithographic Co. v Sarony, 111 US 53, 28 L Ed 349, 4 S Ct 279 (1884)—this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.

In The Trade-Mark Cases, the Court addressed the constitutional scope of "writings." For a particular work to be classified "under the head of writings of authors," the Court determined, "originality is required." 100 US, at 94, 25 L Ed 550. The Court explained that originality requires independent creation plus a modicum of creativity: "[W]hile the word *writings* may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are *original,* and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor,* embodied in the form of books, prints, engravings, and the like." Ibid. (emphasis in original).

In Burrow-Giles, the Court distilled the same requirement from the Constitution's use of the word "authors." The Court defined "author," in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." 111 US, at 58, 28 L Ed 349, 4 S Ct 279 (internal quotation marks omitted). As in

The Trade-Mark Cases, the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," 111 US, at 58, 28 L Ed 349, 4 S Ct 279, and stressed the importance of requiring an author who accuses another of infringement to prove "the existence

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of those facts of originality, of intellectual production, of thought, and conception." Id., at 59-60, 28 L Ed 349, 4 S Ct 279.

The originality requirement articulated in The Trade-Mark Cases and Burrow-Giles remains the touchstone of copyright protection today. See Goldstein v California, 412 US 546, 561-562, 37 L Ed 2d 163, 93 S Ct 2303 (1973). It is the very "premise of copyright law." Miller v Universal City Studios, Inc. 650 F2d 1365, 1368 (CA5 1981). Leading scholars agree on this point. As one pair of commentators succinctly puts it: "The originality requirement is *constitutionally mandated* for all works." Patterson & Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations, 36 UCLA L Rev 719, 763, n 155 (1989) (emphasis in original) (hereinafter Patterson & Joyce). Accord, id., at 759-760, and n 140; Nimmer § 1.06[A] ("[O]riginality is a statutory as well as a constitutional requirement"); id., § 1.08[C][1] ("[A] modicum of intellectual labor . . . clearly constitutes an essential constitutional element").

[3d, 6] It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." Id., § 2.11[A], p 2-157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from Burrow-Giles, one who discovers a fact is not its "maker" or "originator." 111 US, at 58, 28 L Ed 349, 4 S Ct 279. "The discoverer merely finds and records." Nimmer § 2.03[E]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum L Rev 516, 525 (1981) (hereinafter Denicola). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. Nimmer

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§ 2.03[E]. The same is true of all facts—scientific, historical, biographical, and news of the day. "[T]hey may not be copyrighted and are part of the public domain available to every person." Miller, supra, at 1369.

[4b] Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Nimmer §§ 2.11[D], 3.03; Denicola 523, n 38. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional mini-

mum for copyright protection if it features an original selection or arrangement. See Harper & Row, 471 US, at 547, 85 L Ed 2d 588, 105 S Ct 2218. Accord, Nimmer § 3.03.

[3e, 7a] This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Patterson & Joyce 800-802; Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information, 90 Colum L Rev 1865, 1868, and n 12 (1990) (hereinafter Ginsburg). Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. In Harper & Row, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, see 471 US, at 556-557, 85 L Ed 2d 588, 105 S Ct 2218, but that he could prevent others from copying his "subjective descriptions and portraits of public figures."

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Id., at 563, 85 L Ed 2d 588, 105 S Ct 2218. Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. See Patry, Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable), 12 Com & Law 37, 64 (Dec. 1990) (hereinafter Patry). No matter how original the format, however, the facts themselves do not become original through association. See Patterson & Joyce 776.

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking . . . . [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." Ginsburg 1868.

[8] It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." Harper & Row, 471 US, at 589, 85 L Ed 2d 588, 105 S Ct 2218 (dissenting opinion). It is, rather, "the essence of copyright," ibid., and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art I, § 8, cl 8. Accord, Twentieth Century Music Corp. v Aiken, 422 US 151, 156, 45 L Ed 2d 84, 95 S Ct

2040 (1975). To this end, copyright assures authors the right to their original

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expression, but encourages others to build freely upon the ideas and information conveyed by a work. Harper & Row, supra, at 556-557, 85 L Ed 2d 588, 105 S Ct 2218. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." Baker v Selden, 101 US 99, 103, 25 L Ed 841 (1880). We reiterated this point in Harper & Row:

> "[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality.
>
> "[C]opyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example . . . facts, or materials in the public domain—as long as such use does not unfairly appropriate the author's original contributions." 471 US, at 547-548, 85 L Ed 2d 588, 105 S Ct 2218 (citation omitted).

[3f, 4c, 7b] This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to

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the particular selection or arrangement. In no event may copyright extend to the facts themselves.

B

[3g] As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement.

The 1909 Act embodied the originality requirement, but not as clearly as it might have. See Nimmer § 2.01. The subject matter of copyright was set out in §§ 3 and 4 of the Act. Section 4 stated that copyright was available to "all the writings of an author." 35 Stat 1076. By using the words "writings" and "author"—the same words used in Article I, § 8, of the Constitution and defined by the Court in The Trade-Mark Cases and Burrow-Giles—the statute necessarily incorporated the originality requirement articulated in the Court's decisions. It

did so implicitly, however, thereby leaving room for error.

Section 3 was similarly ambiguous. It stated that the copyright in a work protected only "the copyrightable component parts of the work." It thus stated an important copyright principle, but failed to identify the specific characteristic—originality—that determined which component parts of a work were copyrightable and which were not.

Most courts construed the 1909 Act correctly, notwithstanding the less-than-perfect statutory language. They understood from this Court's decisions that there could be no copyright without originality. See Patterson & Joyce 760-761. As explained in the Nimmer treatise: "The 1909 Act neither defined originality, nor even expressly required that a work be 'original' in order to command protection. However, the courts uniformly inferred the requirement from the fact that copyright protection may only be claimed by 'authors'. . . . It was reasoned that since an author is 'the

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. . . creator, originator' it follows that a work is not the product of an author unless the work is original." Nimmer § 2.01 (footnotes omitted) (citing cases).

But some courts misunderstood the statute. See, e. g., Leon v Pacific Telephone & Telegraph Co. 91 F2d 484 (CA9 1937); Jeweler's Circular Publishing Co. v Keystone Publishing Co. 281 F 83 (CA2 1922). These courts ignored §§ 3 and 4, focusing their attention instead on § 5 of the Act. Section 5, however, was purely technical in nature: It provided that a person seeking to register a work should indicate on the application the type of work, and it listed 14 categories under which the work might fall. One of these categories was "[b]ooks, including composite and cyclopaedic works, directories, gazetteers, and other compilations." § 5(a). Section 5 did not purport to say that all compilations were automatically copyrightable. Indeed, it expressly disclaimed any such function, pointing out that "the subject-matter of copyright [i]s defined in section four." Nevertheless, the fact that factual compilations were mentioned specifically in § 5 led some courts to infer erroneously that directories and the like were copyrightable per se, "without any further or precise showing of original—personal—authorship." Ginsburg 1895.

[9] Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in Jeweler's Circular Publishing Co. 281 F, at 88:

> "The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill *or originality,* either in thought or in language, or anything more than industrious
>
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>
> collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author" (emphasis added).

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions—to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information." Id., at 88-89 (internal quotations omitted). "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas. See Miller v Universal City Studios, Inc., 650 F2d, at 1372 (criticizing "sweat of the brow" courts because "ensur[ing] that later writers obtain the facts independently . . . is precisely the scope of protection given . . . copyrighted matter, and the law is clear that facts are not entitled to such protection").

Decisions of this Court applying the 1909 Act make clear that the statute did not permit the "sweat of the brow" approach. The best example is International News Service v Associated Press, 248 US 215, 63 L Ed 211, 39 S Ct 68, 2 ALR 293 (1918). In that decision, the Court stated unambiguously that the 1909 Act conferred copyright protection only on those elements of a work that were original to the author. International News Service had conceded taking news reported by Associated Press and publishing it in its own newspapers. Recognizing that § 5 of the Act specifically mentioned "'periodicals, including newspapers,'" § 5(b), the Court acknowledged that news articles were copyrightable. Id., at 234, 63 L Ed 211, 39 S Ct 68, 2 ALR 293. It flatly rejected, however, the notion that the copyright in an article extended to

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the factual information it contained: "[T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day." Ibid.*

Without a doubt, the "sweat of the brow" doctrine flouted basic copyright principles. Throughout history, copyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." Harper & Row, 471 US, at 563, 85 L Ed 2d 588, 105 S Ct 2218. Accord, Gorman, Fact or Fancy: The Implications for Copyright, 29 J Copyright Soc 560, 563 (1982). But "sweat of the brow" courts took a contrary view; they handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. In truth, "[i]t is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent." Rosemont Enterprises, Inc. v Random House, Inc., 366 F2d 303, 310 (CA2 1966), cert denied, 385 US 1009, 17 L Ed 2d 546, 87 S Ct 714 (1967). "Protection for the fruits of such research . . . may in certain circumstances be available under a

* The Court ultimately rendered judgment for Associated Press on noncopyright grounds that are not relevant here. See 248 US, at 235, 241-242, 63 L Ed 211, 39 S Ct 68, 2 ALR 293.

theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors.'" Nimmer § 3.04, p 3-23 (footnote omitted).

C

"Sweat of the brow" decisions did not escape the attention of the Copyright Office. When Congress decided to overhaul the copyright statute and asked the Copyright Office to study existing problems, see Mills Music, Inc. v Snyder, 469 US 153, 159, 83 L Ed 2d 556, 105 S Ct 638 (1985), the Copyright Office promptly recommended

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that Congress clear up the confusion in the lower courts as to the basic standards of copyrightability. The Register of Copyrights explained in his first report to Congress that "originality" was a "basic requisit[e]" of copyright under the 1909 Act, but that "the absence of any reference to [originality] in the statute seems to have led to misconceptions as to what is copyrightable matter." Report of the Register of Copyrights on the General Revision of the US Copyright Law, 87th Cong, 1st Sess, p 9 (H Judiciary Comm Print 1961). The Register suggested making the originality requirement explicit. Ibid.

Congress took the Register's advice. In enacting the Copyright Act of 1976, Congress dropped the reference to "all the writings of an author" and replaced it with the phrase "original works of authorship." 17 USC § 102(a) [17 USCS § 102(a)]. In making explicit the originality requirement, Congress announced that it was merely clarifying existing law: "The two fundamental criteria of copyright protection [are] originality and fixation in tangible form . . . . The phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change *the standard of originality established by the courts under the present [1909] copyright statute.*" HR Rep No. 94-1476, p 51 (1976) (emphasis added) (hereinafter HR Rep); S Rep No. 94-473, p 50 (1975) (emphasis added) (hereinafter S Rep). This sentiment was echoed by the Copyright Office: "Our intention here is to maintain the *established standards* of originality . . . ." Supplementary Report of the Register of Copyrights on the General Revision of US Copyright Law, 89th Cong, 1st Sess, pt 6, p 3 (H Judiciary Comm Print 1965) (emphasis added).

To ensure that the mistakes of the "sweat of the brow" courts would not be repeated, Congress took additional measures. For example, § 3 of the 1909 Act had stated that copyright protected only the "copyrightable component parts" of a work, but had not identified originality as the basis for distinguishing

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those component parts that were copyrightable from those that were not. The 1976 Act deleted this section and replaced it with § 102(b), which identifies specifically those elements of a work for which copyright is not available: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." Section 102(b) is universally understood to prohibit

any copyright in facts. Harper & Row, supra, at 547, 556, 85 L Ed 2d 588, 105 S Ct 2218. Accord, Nimmer § 2.03[E] (equating facts with "discoveries"). As with § 102(a), Congress emphasized that § 102(b) did not change the law, but merely clarified it: "Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate . . . that the basic dichotomy between expression and idea remains unchanged." HR Rep, at 57; S Rep, at 54.

[10a, 11a] Congress took another step to minimize confusion by deleting the specific mention of "directories . . . and other compilations" in § 5 of the 1909 Act. As mentioned, this section had led some courts to conclude that directories were copyrightable per se and that every element of a directory was protected. In its place, Congress enacted two new provisions. First, to make clear that compilations were not copyrightable per se, Congress provided a definition of the term "compilation." Second, to make clear that the copyright in a compilation did not extend to the facts themselves, Congress enacted § 103.

[10b] The definition of "compilation" is found in § 101 of the 1976 Act. It defines a "compilation" in the copyright sense as "a work formed by the collection and assembling of preexisting materials or of data *that* are selected, coordinated, or arranged *in such a way that* the resulting work as a whole constitutes an original work of authorship" (emphasis added).

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The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable per se. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "'original" work of authorship. "[T]his tripartite conjunctive structure is self-evident, and should be assumed to 'accurately express the legislative purpose.' " Patry 51, quoting Mills Music, 469 US, at 164, 83 L Ed 2d 556, 105 S Ct 638.

At first glance, the first requirement does not seem to tell us much. It merely describes what one normally thinks of as a compilation—a collection of pre-existing material, facts, or data. What makes it significant is that it is not the *sole* requirement. It is not enough for copyright purposes that an author collects and assembles facts. To satisfy the statutory definition, the work must get over two additional hurdles. In this way, the plain language indicates that not every collection of facts receives copyright protection. Otherwise, there would be a period after "data."

The third requirement is also illuminating. It emphasizes that a compilation, like any other work, is copyrightable only if it satisfies the originality requirement ("an *original* work of authorship"). Although § 102 states plainly that the originality requirement applies to all works, the point was emphasized with regard to compilations to ensure that

courts would not repeat the mistake of the "sweat of the brow" courts by concluding that fact-based works are treated differently and measured by some other standard. As Congress explained it, the goal was to "make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works . . . containing preexisting material." HR Rep, at 57; S Rep, at 55.

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[12] The key to the statutory definition is the second requirement. It instructs courts that, in determining whether a fact-based work is an original work of authorship, they should focus on the manner in which the collected facts have been selected, coordinated, and arranged. This is a straight-forward application of the originality requirement. Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented. To that end, the statute dictates that the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection.

Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. It states that, to merit protection, the facts must be selected, coordinated, or arranged "in such a way" as to render the work as a whole original. This implies that some "ways" will trigger copyright, but that others will not. See Patry 57, and n 76. Otherwise, the phrase "in such a way" is meaningless and Congress should have defined "compilation" simply as "a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged." That Congress did not do so is dispositive. In accordance with "the established principle that a court should give effect, if possible, to every clause and word of a statute," Moskal v United States, 498 US 103, 109-110, 112 L Ed 2d 449, 111 S Ct 461 (1990) (internal quotation marks omitted), we conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.

[5b] As discussed earlier, however, the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably,

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the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. See generally Bleistein v Donaldson Lithographing Co., 188 US 239, 251, 47 L Ed 460, 23 S Ct 298 (1903) (referring to "the narrowest and most obvious limits"). Such works are incapable of sustaining a valid copyright. Nimmer § 2.01[B].

[11b] Even if a work qualifies as a copyrightable compilation, it receives only limited protection. This is the point of § 103 of the Act. Section 103 explains that "[t]he subject matter of copyright . . . includes compilations," § 103(a), but that copyright protects only the author's original contributions—not the facts or information conveyed:

"The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." § 103(b).

As § 103 makes clear, copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected. "The most important point here is one that is commonly misunderstood today: copyright . . . has no effect one way or the other on the copyright or public domain status of the preexisting material." HR Rep, at 57; S Rep, at 55. The 1909 Act did not require, as "sweat of the brow" courts mistakenly assumed, that each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another. See, e.g., Jeweler's Circular Publishing Co., 281 F, at 88-89. Rather, the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts.

[13] In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not "sweat of the brow," is the

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touchstone of copyright protection in directories and other fact-based works. Nor is there any doubt that the same was true under the 1909 Act. The 1976 revisions were a direct response to the Copyright Office's concern that many lower courts had misconstrued this basic principle, and Congress emphasized repeatedly that the purpose of the revisions was to clarify, not change, existing law. The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101.

The 1976 revisions have proven largely successful in steering courts in the right direction. A good example is Miller v Universal City Studios, Inc., 650 F2d, at 1369-1370: "A copyright in a directory . . . is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information. Copyright protection does not extend to the facts themselves, and the mere use of information contained in a directory without a substantial copying of the format does not constitute infringement" (citation omitted). Additionally, the Second Circuit, which almost 70 years ago issued the classic formulation of the "sweat of the brow" doctrine in Jewler's Circular Publishing Co., has now fully repudiated the reasoning of that decision. See, e. g., Financial Information, Inc. v Moody's Investors Service, Inc., 808 F2d 204, 207 (CA2 1986), cert denied, 484 US 820, 98 L Ed 2d 42, 108 S Ct 79 (1987); Financial Information, Inc. v Moody's Investors Service, Inc., 751 F2d 501, 510 (CA2 1984) (Newman, J., concurring); Hoehling v Universal City Studios, Inc., 618 F2d 972, 979 (CA2 1980). Even those scholars who believe that "industrious collection" should be rewarded seem to recognize that this is beyond the scope of existing copyright law. See Denicola 516 ("[T]he very vocabulary of copy-

right is ill

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suited to analyzing property rights in works of nonfiction"); id., at 520-521, 525; Ginsburg 1867, 1870.

III

[1b, 14] There is no doubt that Feist took from the white pages of Rural's directory a substantial amount of factual information. At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of Rural's subscribers. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. See Harper & Row, 471 US, at 548, 85 L Ed 2d 588, 105 S Ct 2218. The first element is not at issue here; Feist appears to concede that Rural's directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements. See Brief for Petitioner 18; Pet for Cert 9.

[1c] The question is whether Rural has proved the second element. In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was "original" to Rural? Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not "'owe its origin'" to Rural. Burrow-Giles, 111 US, at 58, 28 L Ed 349, 4 S Ct 279. Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory. The originality requirement "rule[s] out protecting . . . names, addresses, and telephone numbers of which the plaintiff by no stretch of the imagination could be called the author." Patterson & Joyce 776.

Rural essentially concedes the point by referring to the names, towns, and telephone numbers as "preexisting material." Brief for Respondent 17. Section 103(b) states explicitly

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that the copyright in a compilation does not extend to "the preexisting material employed in the work."

The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way. As mentioned, originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. See Patterson & Joyce 760, n 144 ("While this requirement is sometimes characterized as modest, or a low threshold, it is not without effect") (internal quotation marks omitted; citations omitted). As this Court has explained, the Constitution mandates some minimal degree of creativity, see The Trade-Mark Cases, 100 US, at 94, 25 L Ed 550; and an author who claims infringement must prove "the existence of . . . intellectual production, of thought, and conception." Burrow-Giles, supra, at 59-60, 28 L Ed 349, 4 S Ct 279.

The selection, coordination, and arrangement of Rural's white pages

do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural's selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort

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to make the white pages directory useful, but insufficient creativity to make it original.

[15] We note in passing that the selection featured in Rural's white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly "select" to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. See 737 F Supp, at 612. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.

[1d] Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. See Brief for Information Industry Association et al. as Amici Curiae 10 (alphabetical arrangement "is universally observed in directories published by local exchange telephone companies"). It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.

[1e, 4d, 10c] We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 USC § 101 [17 USCS § 101] does not afford protection

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from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

[2b] Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, " 'great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.' " Baker v Selden, 101 US, at 105, 25 L Ed 841.

The judgment of the Court of Appeals is reversed.

Justice **Blackmun** concurs in the judgment.

EDITOR'S NOTE

An annotation on "Supreme Court's views as to when books or other written or printed materials are copyrightable under federal law," appears p 771, infra.

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CITY OF COLUMBIA and COLUMBIA OUTDOOR ADVERTISING, INC., Petitioners

v

OMNI OUTDOOR ADVERTISING, INC.

499 US 365, 113 L Ed 2d 382, 111 S Ct 1344

[No. 89-1671]

Argued November 28, 1990. Decided April 1, 1991.

Decision: Federal antitrust laws held inapplicable to actions of (1) city which enacted billboard zoning ordinances, and (2) company which controlled relevant billboard market and which lobbied for ordinances.

SUMMARY

In 1981, a Georgia corporation began erecting billboards in and around the city of Columbia, South Carolina. In response, a South Carolina corporation—which had been in the billboard business in Columbia since the 1940s, and which controlled more than 95 percent of the relevant market in the Columbia area—met with city officials to seek the enactment of zoning ordinances that would restrict billboard construction. The South Carolina corporation was owned by a family whose members enjoyed close relations with the city's political leaders. In 1982, the city council passed an ordinance which imposed a moratorium period on billboard construction in the city, except as specifically authorized by the council. After this ordinance was invalidated by a state court on federal and state constitutional grounds, the city council passed a new ordinance which restricted the size, location, and spacing of billboards. Two months later, the Georgia corporation filed suit in United States District Court against both the South Carolina corporation and the city. The Georgia corporation alleged that the city's billboard ordinances (1) violated (a) §§ 1 and 2 of the Sherman Act (15 USCS §§ 1, 2), and (b) South Carolina's unfair trade practices statute; and (2) were the result of an anticompetitive conspiracy between city officials and the South Carolina corporation which stripped both parties of any immunity from the federal antitrust laws which they otherwise might have enjoyed. A jury returned general verdicts against the city and the South Carolina corporation on both the federal and state claims. The city and the South Carolina

Briefs of Counsel, p 800, infra.

corporation moved for judgment notwithstanding the verdicts, and the District Court—finding that the activities of both parties were outside the scope of the federal antitrust laws—granted the motion. On appeal, the United States Court of Appeals for the Fourth Circuit (1) reversed the judgment of the District Court, and (2) reinstated the jury verdicts on all counts (891 F2d 1127).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., it was held that (1) the ordinance restricting the size, location, and spacing of billboards was entitled to immunity from the federal antitrust laws, where state statutes (a) authorized the city, through the exercise of its zoning power, to regulate the size, location, and spacing of billboards, and (b) clearly articulated a state policy to authorize the city's anticompetitive conduct in connection with its regulation; (2) there was no "conspiracy" exception to the rule, under Parker v Brown (1943) 317 US 341, 87 L Ed 315, 63 S Ct 307, that the Sherman Act did not apply to anticompetitive restraints imposed by the states as an act of government, and any governmental action that qualified as state action—with the possible exception of instances where the state acts not in a regulatory capacity, but as a commercial participant in a given market—was ipso facto exempt from the operation of the federal antitrust laws; (3) the "sham" exception to the rule, under Eastern R. Presidents Conference v Noerr Motor Freight, Inc. (1961) 365 US 127, 5 L Ed 2d 464, 81 S Ct 523, that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from state governments—which exception applies to situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon—was inapplicable to the South Carolina corporation under the circumstances; (4) there was no "conspiracy" exception to the Noerr rule; and (5) the Supreme Court would remand the case for further proceedings, so that the Court of Appeals could determine (a) whether there should be a new trial with respect to only the private anticompetitive actions allegedly engaged in by the corporation, and (b) the effect of the Supreme Court's holding on the claim under the South Carolina unfair trade practices statute.

STEVENS, J., joined by WHITE and MARSHALL, JJ., dissenting, (1) agreed that (a) there was no "conspiracy" exception to the Parker rule when a state acted in a nonproprietary capacity, and (b) the "sham" exception to the Noerr rule did not apply to the South Carolina corporation's conduct in the case at hand; but (2) expressed the view that the Court of Appeals' judgment should be affirmed as to both the city and the South Carolina corporation, because (a) the city's economic regulation of the billboard market pursuant to a general state grant of zoning power was not exempt from antitrust scrutiny, and (b) a private party's agreement with selfishly motivated public officials was sufficient to remove the antitrust immunity that protected private lobbying under the Noerr rule.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — immunity of municipality — billboard ordinance

1a-1c. A municipality's enactment of an ordinance which restricts the size, location, and spacing of billboards is entitled to immunity from

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54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 15, 18

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade § 54:161.5

12B Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade § 48:180

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS §§ 1 et seq.

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices §§ 9, 10

L Ed Index, Conspiracy; Municipal Corporations and Other Political Subdivisions; Noerr-Pennington Doctrine; Restraints of Trade, Monopolies, and Unfair Trade Practices; Sherman Act

Index to Annotations, Conspiracy; Municipal Corporations; Noerr-Pennington Doctrine; Restraints of Trade and Monopolies; State Action

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Right of petition and assembly under Federal Constitution's First Amendment—Supreme Court cases. 86 L Ed 2d 758.

What constitutes "state action" under rule exempting state and local governmental action from antitrust laws—federal cases. 70 L Ed 2d 973.

"Sham" exception to application of Noerr-Pennington Doctrine, exempting from federal antitrust laws joint efforts to influence governmental action. 71 ALR Fed 723.

Application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed 645.

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws. 12 ALR Fed 329.

the federal antitrust laws, where state statutes (1) authorize the municipality, through the exercise of its zoning power, to regulate the size, location, and spacing of billboards, and (2) clearly articulate a state policy to authorize the municipality's anticompetitive conduct in connection with the municipality's regulation, since an ordinance containing such restrictions necessarily protects existing billboards against some competition from newcomers. (Stevens, White, and Marshall, JJ., dissented from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices §§ 9, 10 — state-action exemption — "conspiracy" exception

2a-2c. There is no "conspiracy" exception to the rule that the Sherman Act (15 USCS §§ 1 et seq.) does not apply to anticompetitive restraints imposed by the states as an act of government; any governmental action that qualifies as state action—with the possible exception of instances where the state acts not in a regulatory capacity, but as a commercial participant in a given market—is ipso facto exempt from the operation of the federal antitrust laws; while a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful, the Sherman Act cannot be interpreted so as to allow plaintiffs to look behind the actions of state sovereigns in order to base claims on perceived conspiracies to restrain trade. (Stevens, White, and Marshall, JJ., dissented in part from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — exemption for private individuals' interaction with government — "sham" exception

3a-3c. The "sham" exception to the rule that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from state governments—which exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon—is inapplicable to a corporation in the billboard business which interacted with a municipality's officials for the purpose of delaying a competitor's entry into the market through the enactment of zoning ordinances, because (1) the corporation had set out to disrupt the competitor's business relationships not through the very process of lobbying, or of causing the officials to consider zoning measures, but rather through the ordinances, which were the ultimate product of that lobbying and consideration, (2) the delay in the competitor's entry into the market was not sought to be achieved by only the lobbying process itself, and (3) denial of meaningful access by the competitor to the appropriate administrative and legislative fora of the municipality—although possibly rendering the manner of lobbying improper or even unlawful—does not necessarily render the lobbying process a "sham" for purposes of the Sherman Act (15 USCS §§ 1 et seq.).

Restraints of Trade, Monopolies, and Unfair Trade Practices §§ 9, 10 — exemption for private individuals' interaction with government — "conspiracy" exception

4a, 4b. There is no "conspiracy" exception to the rule that the federal antitrust laws do not regulate

the conduct of private individuals in seeking anticompetitive action from state governments, because (1) it would be impracticable or beyond the scope of the antitrust laws to identify and invalidate lobbying by private individuals that has produced selfishly motivated agreement with public officials, and (2) if a conspiracy is limited to one that involves some element of unlawfulness beyond mere anticompetitive motivation, invalidation of the private individuals' conduct would have nothing to do with the policies of the antitrust laws. (Stevens, White, and Marshall, JJ., dissented from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — municipalities — immunity — determining authority under state law

5. For purposes of determining whether a municipality has acted beyond its delegated authority under state law, so as not to be immune from application of the federal antitrust laws, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — municipalities — immunity — regulatory authority

6a, 6b. In order for a municipality to assert its immunity from application of the federal antitrust laws with respect to regulation by the municipality, there must be (1) authority to regulate under state law—although the municipality need not be able to point to a specific, detailed legislative authorization—and (2) authority to suppress competition, which requires clear articulation of a state policy to authorize anticompetitive conduct by the municipality in connection with its regulation; a state statute delegating authority to suppress competition need not explicitly permit the displacement of competition, and it is enough if such suppression is the foreseeable result of what the statute authorizes.

Courts §§ 95.5, 102 — purpose of governmental action — constitutional question

7a, 7b. In cases which involve a challenge to an action taken by governmental officials, the United States Supreme Court will apply a subjective test to determine whether the officials thought that the action was in the public interest only where (1) a constitutional question is presented, and (2) the very nature of the question requires such an inquiry.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — state action — motive

8. Where an action complained of is that of the state itself, the action is exempt from antitrust liability regardless of the state's motives in taking the action.

Bribery § 1 — action in public interest

9. A mayor is guilty of accepting a bribe even if, in the public interest, the mayor would and should have taken the same action for which the bribe was paid.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — political activities

10. Insofar as the Sherman Act (15 USCS §§ 1 et seq.) sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — exemption for private individuals' interaction with government

11a, 11b. The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government with the intent to restrain trade; such laws, tailored as they are for the business world, are not appropriate for application in the political arena, and it is irrelevant that a private party's political motives are selfish; the policing of the legitimate boundaries of procedural and other means used by lobbyists or applicants who seek to have their opponent ignored is not the role of the Sherman Act (15 USCS §§ 1 et seq.) when such defensive strategies are conducted in the context of a genuine attempt to influence governmental action.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — exemption for private individuals' interaction with government — "sham" exception

12. A "sham" exception to the rule that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government exists for situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon, such as where a person files frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license, but simply in order to impose expense and delay; for purposes of this exception, a "sham" situation involves a party whose activities are not genuinely aimed at procuring favorable government action, but does not involve a party who genuinely seeks to achieve a governmental result through improper means.

Appeal §§ 1692.2, 1692.3 — remand — issue not decided — misconception as to law

13a, 13b. In light of the United States Supreme Court's holding that a private corporation is entitled to immunity from the federal antitrust laws for its activities relating to the enactment by a municipality of certain billboard ordinances, the United States Supreme Court—upon reversing a Federal Court of Appeals decision which had reinstated a jury's general verdict that the corporation had violated §§ 1 and 2 of the Sherman Act (15 USCS §§ 1, 2) and a state unfair trade practices statute—will remand the case for further proceedings, so that the Court of Appeals can determine (1) whether there should be a new trial with respect to only the private anticompetitive actions—such as trade libel, the setting of artificially low rates, and inducement to breach of contract—allegedly engaged in by the corporation; and (2) the effect of the Supreme Court's holding on the claim against the corporation under the state unfair trade practices statute, where the Court of Appeals had ruled that (a) the corporation had conspired to restrain competition in violation of federal antitrust law, and (b) such conspiracy was "tantamount" to a violation of the state statute.

Appeal § 1585; New Trial § 7 — reversal — error in instructions and verdict

14. On appellate review, a jury's general verdict against a private cor-

poration and in favor of its competitor, based on instructions that erroneously permitted the assessment of liability against the corporation, under the federal antitrust laws, for seeking the enactment by a municipality of certain billboard ordinances, cannot be permitted to stand; however, the competitor will be entitled to a new trial if (1) the evidence was sufficient to sustain a verdict solely on the basis of the corporation's private anticompetitive actions—such as trade libel, the setting of artificially low rates, and inducement to breach of contract—and (2) the theory of liability as to such other actions has been properly preserved.

SYLLABUS BY REPORTER OF DECISIONS

After respondent Omni Outdoor Advertising, Inc., entered the billboard market in petitioner Columbia, South Carolina, petitioner Columbia Outdoor Advertising, Inc. (COA), which controlled more than 95% of the market and enjoyed close relations with city officials, lobbied these officials to enact zoning ordinances restricting billboard construction. After such ordinances were passed, Omni filed suit against petitioners under §§ 1 and 2 of the Sherman Act and the State's Unfair Trade Practices Act, alleging, inter alia, that the ordinances were the result of an anticompetitive conspiracy that stripped petitioners of any immunity to which they might otherwise be entitled. After Omni obtained a jury verdict on all counts, the District Court granted petitioners' motions for judgment notwithstanding the verdict on the ground that their activities were outside the scope of the federal antitrust laws. The Court of Appeals reversed and reinstated the verdict.

Held:

1. The city's restriction of billboard construction is immune from federal antitrust liability under Parker v Brown, 317 US 341, 352, 87 L Ed 315, 63 S Ct 307—which held that principles of federalism and state sovereignty render the Sherman Act inapplicable to anticompetitive restraints imposed by the States "as an act of government"—and subsequent decisions according Parker immunity to municipal restriction of competition in implementation of state policy, see, e.g., Hallie v Eau Claire, 471 US 34, 38, 85 L Ed 2d 24, 105 S Ct 1713.

(a) The Court of Appeals correctly concluded that the city was prima facie entitled to Parker immunity for its billboard restrictions. Although Parker immunity does not apply directly to municipalities or other political subdivisions of the States, it does apply where a municipality's restriction of competition is an authorized implementation of state policy. South Carolina's zoning statutes unquestionably authorized the city to regulate the size, location, and spacing of billboards. The additional Parker requirement that the city possess clear delegated authority to suppress competition, see, e.g., Hallie, supra, at 40-42, 85 L Ed 2d 24, 105 S Ct 1713, is also met here, since suppression of competition is at the very least a foreseeable result of zoning regulations.

(b) The Court of Appeals erred, however, in applying a "conspiracy" exception to Parker, which is not supported by the language of that case. Such an exception would swal-

low up the Parker rule if "conspiracy" means nothing more than agreement to impose the regulation in question, since it is both inevitable and desirable that public officials agree to do what one or another group of private citizens urges upon them. It would be similarly impractical to limit "conspiracy" to instances of governmental "corruption," or governmental acts "not in the public interest"; virtually all anticompetitive regulation is open to such charges and the risk of unfavorable ex post facto judicial assessment would impair the States' ability to regulate their domestic commerce. Nor is it appropriate to limit "conspiracy" to instances in which bribery or some other violation of state or federal law has been established, since the exception would then be unrelated to the purposes of the Sherman Act, which condemns trade restraints, not political activity. With the possible exception of the situation in which the State is acting as a market participant, any action that qualifies as state action is ipso facto exempt from the operation of the antitrust laws.

2. COA is immune from liability for its activities relating to enactment of the ordinances under Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc. 365 US 127, 141, 5 L Ed 2d 464, 81 S Ct 523, which states a corollary to Parker: The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. The Court of Appeals erred in applying the "sham" exception to the Noerr doctrine. This exception encompasses situations in which persons use the governmental process itself—as opposed to the *outcome* of that process—as an anticompetitive weapon. That is not the situation here. California Motor Transport Co. v Trucking Unlimited, 404 US 508, 512, 30 L Ed 2d 642, 92 S Ct 609, distinguished. Omni's suggestion that this Court adopt a "conspiracy" exception to Noerr immunity is rejected for largely the same reasons that prompt the Court to reject such an exception to Parker.

3. The Court of Appeals on remand must determine (if the theory has been properly preserved) whether the evidence was sufficient to sustain a verdict for Omni based solely on its assertions that COA engaged in *private* anticompetitive actions, and whether COA can be held liable to Omni on its state-law claim.

891 F2d 1127, reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Blackmun, O'Connor, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which White and Marshall, JJ., joined.

APPEARANCES OF COUNSEL

Joel I. Klein argued the cause for petitioners.

A. Camden Lewis argued the cause for respondent.

Briefs of Counsel, p 800, infra.

OPINION OF THE COURT

[499 US 367]

Justice **Scalia** delivered the opinion of the Court.

[1a, 2a, 3a, 4a] This case requires us to clarify the application of the Sherman Act to municipal governments and to the citizens who seek action from them.

I

Petitioner Columbia Outdoor Advertising, Inc. (COA), a South Carolina corporation, entered the billboard business in the city of Columbia, South Carolina (also a petitioner here), in the 1940's. By 1981 it controlled more than 95% of what has been conceded to be the relevant market. COA was a local business owned by a family with deep roots in the community, and enjoyed close relations with the city's political leaders. The mayor and other members of the city council were personal friends of COA's majority owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns. According to respondent Omni Outdoor Advertising, Inc., these beneficences were part of a "longstanding" "secret anticompetitive agreement" whereby "the City and COA would each use their [sic] respective power and resources to protect . . . COA's monopoly position," in return for which "City Council members received advantages made possible by COA's monopoly." Brief for Respondent 12, 16.

[499 US 368]

In 1981, Omni, a Georgia corporation, began erecting billboards in and around the city. COA responded to this competition in several ways. First, it redoubled its own billboard construction efforts and modernized its existing stock. Second—according to Omni—it took a number of anticompetitive private actions, such as offering artificially low rates, spreading untrue and malicious rumors about Omni, and attempting to induce Omni's customers to break their contracts. Finally (and this is what gives rise to the issue we address today), COA executives met with city officials to seek the enactment of zoning ordinances that would restrict billboard construction. COA was not alone in urging this course; concerned about the city's recent explosion of billboards, a number of citizens, including writers of articles and editorials in local newspapers, advocated restrictions.

In the spring of 1982, the city council passed an ordinance requiring the council's approval for every billboard constructed in downtown Columbia. This was later amended to impose a 180-day moratorium on the construction of billboards throughout the city, except as specifically authorized by the council. A state court invalidated this ordinance on the ground that its conferral of unconstrained discretion upon the city council violated both the South Carolina and Federal Constitutions. The city then requested the State's regional planning authority to conduct a comprehensive analysis of the local billboard situation as a basis for developing a final, constitutionally valid, ordinance. In September 1982, after a series of public hearings and numerous meetings involving city officials, Omni, and COA (in all of which, according to Omni, positions contrary to COA's were not genuinely considered), the city council passed a new ordinance restricting the size, location, and spacing of billboards. These restrictions, particularly those on spacing, obviously benefited COA, which already had its billboards in place; they severely hindered Omni's ability to compete.

[499 US 369]

In November 1982, Omni filed suit against COA and the city in Federal District Court, charging that they had violated §§ 1 and 2 of the Sherman Act, 26 Stat 209, as amended,

15 USC §§ 1, 2 [15 USCS §§ 1, 2],[1] as well as South Carolina's Unfair Trade Practices Act, SC Code Ann § 39-5-140 (1976). Omni contended, in particular, that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and COA that stripped both parties of any immunity they might otherwise enjoy from the federal antitrust laws. In January 1986, after more than two weeks of trial, a jury returned general verdicts against the city and COA on both the federal and state claims. It awarded damages, before trebling, of $600,000 on the § 1 Sherman Act claim, and $400,000 on the § 2 claim.[2] The jury also answered two special interrogatories, finding specifically that the city and COA had conspired both to restrain trade and to monopolize the market. Petitioners moved for judgment notwithstanding the verdict, contending among other

[499 US 370]

things that their activities were outside the scope of the federal antitrust laws. In November 1988, the District Court granted the motion.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and reinstated the jury verdict on all counts. 891 F2d 1127 (1989). We granted certiorari, 496 US 935, 110 L Ed 2d 659, 110 S Ct 3211 (1990).

II

In the landmark case of Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943), we rejected the contention that a program restricting the marketing of privately produced raisins, adopted pursuant to California's Agricultural Prorate Act, violated the Sherman Act. Relying on principles of federalism and state sovereignty, we held that the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." 317 US, at 352, 87 L Ed 315, 63 S Ct 307.

Since Parker emphasized the role of sovereign States in a federal system, it was initially unclear whether the governmental actions of political subdivisions enjoyed similar protection. In recent years, we have held that Parker immunity does not apply directly to local governments, see Hallie v Eau Claire, 471 US 34, 38, 85 L Ed 2d 24, 105 S Ct 1713

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1. Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 USC § 1 [15 USCS § 1].

Section 2 provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 USC § 2 [15 USCS § 2].

2. The monetary damages in this case were assessed entirely against COA, the District Court having ruled that the city was immunized by the Local Government Antitrust Act of 1984, 98 Stat 2750, as amended, 15 USC §§ 34-36 [15 USCS §§ 34-36], which exempts local governments from paying damages for violations of the federal antitrust laws. Although enacted in 1984, after the events at issue in this case, the Act specifically provides that it may be applied retroactively if "the defendant establishes and the court determines, in light of all the circumstances . . . that it would be inequitable not to apply this subsection to a pending case." 15 USC § 35(b) [15 USCS § 35(b)]. The District Court determined that it would be, and the Court of Appeals refused to disturb that judgment. Respondent has not challenged that determination in this Court, and we express no view on the matter.

(1985); Community Communications Co. v Boulder, 455 US 40, 50-51, 70 L Ed 2d 810, 102 S Ct 835 (1982); Lafayette v Louisiana Power & Light Co. 435 US 389, 412-413, 55 L Ed 2d 364, 98 S Ct 1123 (1978) (plurality opinion). We have recognized, however, that a municipality's restriction of competition may sometimes be an authorized implementation of state policy, and have accorded Parker immunity where that is the case.

[1b, 5] The South Carolina statutes under which the city acted in the present case authorize municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries.[3] It is undisputed that, as a matter

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of state law, these statutes authorize the city to regulate the size, location, and spacing of billboards. It could be argued, however, that a municipality acts beyond its delegated authority, for Parker purposes, whenever the nature of its regulation is substantively or even procedurally defective. On such an analysis it could be contended, for example, that the city's regulation in the present case was not "authorized" by SC Code Ann § 5-23-10 (1976), see n 3, supra, if it was not, as that statute requires, adopted "for the purpose of promoting health, safety, morals or the general welfare of the community." As scholarly commentary has noted, such an expansive interpretation of the Parker-defense authorization requirement would have unacceptable consequences.

> "To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to
>
> [499 US 372]
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> reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its

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3. SC Code Ann § 5-23-10 (1976) ("Building and zoning regulations authorized") provides that "[f]or the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures."

Section 5-23-20 ("Division of municipality into districts") provides that "[f]or any or all of such purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land."

Section 6-7-710 (1976) ("Grant of power for zoning") provides that "[f]or the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories and size of buildings and other structures. . . . The regulations shall . . . be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements."

> power in a manner not authorized by state law. We should not lightly assume that Lafayette's authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 212.3b, p 145 (Supp 1989).

We agree with that assessment, and believe that in order to prevent Parker from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. We have adopted an approach that is similar in principle, though not necessarily in precise application, elsewhere. See Stump v Sparkman, 435 US 349, 55 L Ed 2d 331, 98 S Ct 1099 (1978). It suffices for the present to conclude that here no more is needed to establish, for Parker purposes, the city's authority to regulate than its unquestioned zoning power over the size, location, and spacing of billboards.

[1c, 6a] Besides authority to regulate, however, the Parker defense also requires authority to suppress competition—more specifically, "clear articulation of a state policy to authorize anticompetitive conduct" by the municipality in connection with its regulation. Hallie, 471 US, at 40, 85 L Ed 2d 24, 105 S Ct 1713 (internal quotation omitted). We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition, see id., at 41-42, 85 L Ed 2d 24, 105 S Ct 1713.

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It is enough, we have held, if suppression of competition is the "foreseeable result" of what the statute authorizes, id., at 42, 85 L Ed 2d 24, 105 S Ct 1713. That condition is amply met here. The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.[4]

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4. The dissent contends that, in order successfully to delegate its Parker immunity to a municipality, a State must expressly authorize the municipality to engage (1) in specifically "economic regulation," post, at 388, 113 L Ed 2d, at 403, (2) of a specific industry, post, at 391, 113 L Ed 2d, at 405. These dual specificities are without support in our precedents, for the good reason that they defy rational implementation.

If, by authority to engage in specifically "economic" regulation, the dissent means authority specifically to regulate competition, we squarely rejected that in Hallie v Eau Claire, 471 US 34, 85 L Ed 2d 24, 105 S Ct 1713 (1985), as discussed in text. Seemingly, however, the dissent means only that the State authorization must specify that sort of regulation whereunder "decisions about prices and output are made not by individual firms, but rather by a public body." Post, at 387, 113 L Ed 2d, at 402. But why is not the restriction of billboards in a city a restriction on the "output" of the local billboard industry? It assuredly *is*—and that is indeed the very gravamen of Omni's complaint. It seems to us that the dissent's concession that "it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare," post, at 393, 113 L Ed 2d, at 406, is a gross understatement. Loose talk about a "regulated industry" may suffice for what the dissent calls "antitrust parlance," post, at 387, 113 L Ed 2d, at 402, but it is not

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The Court of Appeals was therefore correct in its conclusion that the city's restriction of billboard construction was prima facie entitled to Parker immunity. The Court of Appeals upheld the jury verdict, however, by invoking a "conspiracy" exception to Parker that has been recognized by several Courts of Appeals. See, e.g., Whitworth v Perkins, 559 F2d 378 (CA5 1977), vacated, 435 US 992, 56 L Ed 2d 81, 98 S Ct 1642, aff'd on rehearing, 576 F2d 696 (1978), cert denied, 440 US 911, 59 L Ed 2d 460, 99 S Ct 1224 (1979). That exception is though to be supported by two of our statements in Parker: "[W]e have no question of the state or its municipality becoming a *participant in a private agreement* or combination by others for restraint of trade, cf. Union Pacific R. Co. v United States, 313 US 450 [85 L Ed 1453, 61 S Ct 1064]." Parker, 317 US, at 351-352, 87 L Ed 315, 63 S Ct 307 (emphasis added). "The state in adopting and enforcing the prorate program made no contract or agreement *and entered into no conspiracy in restraint of trade or to establish monopoly* but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." Id., at 352, 87 L Ed 315, 63 S Ct 307 (emphasis added). Parker does not apply, according to the Fourth Circuit, "where politicians or political entities are involved as conspirators" with private actors in the restraint of trade. 891 F2d, at 1134.

[2b] There is no such conspiracy exception. The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. The sentences from the opinion quoted above simply clarify that this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial

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participant in a given market. That is evident from the citation of Union Pacific R. Co. v United States, 313 US 450, 85 L Ed 1453, 61 S Ct 1064 (1941), which held unlawful under the Elkins Act certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities. These sentences should not be read to suggest the general proposition that even governmental *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties. The impracticality of such a principle is evident if, for purposes of the exception, "conspir-

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a definition upon which the criminal liability of public officials ought to depend.

[6b] Under the dissent's second requirement for a valid delegation of Parker immunity—that the authorization to regulate pertain to a specific industry—the problem with the South Carolina statute is that it used the generic term "structures," instead of conferring its regulatory authority industry-by-industry (presumably "billboards," "movie houses," "mobile homes," "TV antennas," and every other conceivable object of zoning regulation that can be the subject of a relevant "market" for purposes of antitrust analysis). To describe this is to refute it. Our precedents not only fail to suggest, but positively reject, such an approach. "[T]he municipality need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful Parker defense to an antitrust suit." Hallie, 471 US, at 39, 85 L Ed 2d 24, 105 S Ct 1713 (quoting Lafayette v Louisiana Power & Light, 435 US 389, 415, 55 L Ed 2d 364, 98 S Ct 1123 (1978)).

acy" means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the Parker rule: All anticompetitive regulation would be vulnerable to a "conspiracy" charge. See Areeda & Hovenkamp, supra, ¶ 203.3b, at 34, and n 1; Elhauge, The Scope of Antitrust Process, 104 Harv L Rev 667, 704-705 (1991).[5]

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Omni suggests, however, that "conspiracy" might be limited to instances of governmental "corruption," defined variously as "abandonment of public responsibilities to private interests," Brief for Respondent 42, "corrupt or bad faith decisions," id., at 44, and "selfish or corrupt motives," ibid. Ultimately, Omni asks us not to define "corruption" at all, but simply to leave that task to the jury: "[a]t bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community." Id., at 43. Omni's amicus eschews this emphasis on "corruption," instead urging us to define the conspiracy exception as encompassing any governmental act "not in the public interest." Brief for Associated Builders and Contractors, Inc., as Amicus Curiae 5.

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[7a, 8] A conspiracy exception nar-

5. The dissent is confident that a jury composed of citizens of the vicinage will be able to tell the difference between "independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party." Post, at 395-396, 113 L Ed 2d, at 408. No doubt. But those are merely the polar extremes, which like the geographic poles will rarely be seen by jurors of the vicinage. Ordinarily the allegation will merely be (and the dissent says this is enough) that the municipal action was not prompted "*exclusively* by a concern for the general public interest," post, at 387, 113 L Ed 2d, at 402 (emphasis added). Thus, the real question is whether a jury can tell the difference—whether Solomon can tell the difference—between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*. The dissent does not tell us how to put this question coherently, much less how to answer it intelligently. "*Independent* municipal action" is unobjectionable, "action taken for the *sole* purpose of carrying out an anticompetitive agreement for the private party" is unlawful, and everything else (that is, the known world between the two poles) is unaddressed.

The dissent contends, moreover, that "[t]he instructions in this case, fairly read, told the jury that the plaintiff should not prevail *unless* the ordinance was enacted for the sole purpose of interfering with access to the market." Post, at 396, n 9, 113 L Ed 2d, at 408 (emphasis added). That is not so. The sum and substance of the jury's instructions here was that anticompetitive municipal action is not lawful when taken as part of a conspiracy, and that a conspiracy is "an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner." App 79. Although the District Court explained that "[i]t is perfectly lawful for any and all persons to petition their government," the court immediately added, "but they may not do so as a part or as the object of a conspiracy." Ibid. These instructions, then, are entirely circular: An anticompetitive agreement becomes unlawful if it is part of a conspiracy, and a conspiracy is an agreement to do something unlawful. The District Court's observation, upon which the dissent places so much weight, that "if by the evidence you find that [COA] procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of [Omni] to the marketing area involved in this case . . . and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws" id., at 81, see post, at 387, n 2, 113 L Ed 2d, at 402, is in no way tantamount to an instruction that this was the *only* theory upon which the jury could find an immunity-destroying "conspiracy."

rowed along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt." The California marketing scheme at issue in Parker itself, for example, can readily be viewed as the result of a "conspiracy" to put the "private" interest of the State's raisin growers above the "public" interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. Parker was not written in ignorance of the reality that determination of "the public interest" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries. If the city of Columbia's decision to regulate what one local newspaper called "billboard jungles," Columbia Record, May 21, 1982, p 14-A, col 1; App in No. 88-1388 (CA4), p 3743, is made subject to ex post facto judicial assessment of "the public interest," with personal liability of city officials a possible consequence, we will have gone far to "compromise the States' ability to regulate their domestic commerce," Southern Motor Carriers Rate Conference, Inc. v United States, 471 US 48, 56, 85 L Ed 2d 36, 105 S Ct 1721 (1985). The situation would not be better, but arguably even worse, if the courts were to apply a subjective test: not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official "intent" that we have consistently sought to avoid.[6] "[W]here the action complained

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of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." Hoover v Ronwin, 466 US 558, 579-580, 80 L Ed 2d 590, 104 S Ct 1989 (1984). See also Llewellyn v Crothers, 765 F2d 769, 774 (CA9 1985) (Kennedy, J.).

[9, 10] The foregoing approach to establishing a "conspiracy" exception at least seeks (however impractically) to draw the line of impermissible action in a manner relevant to the purposes of the Sherman Act and of Parker: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest. Another approach is possible, which has the virtue of practicality but the vice of being unrelated to those purposes. That is the approach which would consider Parker inapplicable only if, in connection with the governmental action in question, bribery or some other violation of state or federal law has been established. Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest. A mayor is guilty of accepting a bribe even if he would and

6. **[7b]** We have proceeded otherwise only in the "very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry." United States v O'Brien, 391 US 367, 383, n 30, 20 L Ed 2d 672, 88 S Ct 1673 (1968) (bill of attainder). See also Arlington Heights v Metropolitan Housing Development Corp. 429 US 252, 268, n 18, 50 L Ed 2d 450, 97 S Ct 555 (1977) (race-based motivation).

should have taken, in the public interest, the same action for which the bribe was paid. (That is frequently the defense asserted to a criminal bribery charge—and though it is never valid in law, see, e.g., United States v Jannotti, 673 F2d 578, 601 (CA3) (en banc), cert denied, 457 US 1106, 73 L Ed 2d 1315, 102 S Ct 2906 (1982), it is often plausible in fact.) When, moreover, the regulatory body is not a single individual but a state legislature or city council, there is even less reason to believe that violation of the law (by bribing a minority of the decisionmakers) establishes that the regulation has no valid public purpose. Cf. Fletcher v Peck, 6 Cranch 87, 130, 3 L Ed 162 (1810). To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed

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at combating corruption in state and local governments. See, e.g., 18 USC § 1951 [18 USCS § 1951] (Hobbs Act). "Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity." Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc. 365 US 127, 140, 5 L Ed 2d 464, 81 S Ct 523 (1961).

[2c] For these reasons, we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade," Hoover, 466 US, at 580, 80 L Ed 2d 590, 104 S Ct 1989. We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is "ipso facto . . . exempt from the operation of the antitrust laws," id., at 568, 80 L Ed 2d 590, 104 S Ct 1989. This does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well-established principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." Parker, 317 US, at 351, 87 L Ed 315, 63 S Ct 307 (citing Northern Securities Co. v United States, 193 US 197, 332, 344-347, 48 L Ed 679, 24 S Ct 436 (1904)). See also Schwegmann Brothers v Calvert Distillers Corp. 341 US 384, 95 L Ed 1035, 71 S Ct 745, 19 ALR2d 1119 (1951).

III

[3b, 11a] While Parker recognized the States' freedom to engage in anticompetitive regulation, it did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation. However, it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," US Const, Amdt 1, to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc., supra, we have developed a corollary to Parker: The federal antitrust laws also do not regulate the conduct of private individuals in seeking

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anticompetitive action from the government. This doctrine, like Parker, rests ultimately upon a recognition that the antitrust laws, "tailored as they are

for the business world, are not at all appropriate for application in the political arena." Noerr, supra, at 141, 5 L Ed 2d 464, 81 S Ct 523. That a private party's political motives are selfish is irrelevant: "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." Mine Workers v Pennington, 381 US 657, 670, 14 L Ed 2d 626, 85 S Ct 1585 (1965).

[12] Noerr recognized, however, what has come to be known as the "sham" exception to its rule: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 US, at 144, 5 L Ed 2d 464, 81 S Ct 523. The Court of Appeals concluded that the jury in this case could have found that COA's activities on behalf of the restrictive billboard ordinances fell within this exception. In our view that was error.

The "sham" exception to Noerr encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See California Motor Transport Co. v Trucking Unlimited, 404 US 508, 30 L Ed 2d 642, 92 S Ct 609 (1972). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, Allied Tube & Conduit Corp. v Indian Head, Inc. 486 US 496, 500, n 4, 100 L Ed 2d 497, 108 S Ct 1931 (1988), not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means,*' " id., at 508, n 10, 100 L Ed 2d 497, 108 S Ct 1931 (quoting Sessions Tank Liners, Inc. v Joor Mfg., Inc. 827 F2d 458, 465, n 5 (CA9 1987)).

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[3c, 11b] Neither of the Court of Appeals' theories for application of the "sham" exception to the facts of the present case is sound. The court reasoned, first, that the jury could have concluded that COA's interaction with city officials " 'was actually nothing more than an attempt to interfere directly with the business relations [sic] of a competitor.' " 891 F2d, at 1139 (quoting Noerr, supra, at 144, 5 L Ed 2d 464, 81 S Ct 523). This analysis relies upon language from Noerr, but ignores the import of the critical word "directly." Although COA indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances. The Court of Appeals' second theory was that the jury could have found "that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora." 891 F2d, at 1139. But the purpose of delaying a competitor's entry into the market does not render lobbying activity a "sham," unless (as no evidence suggested was true here) the delay is sought to be

achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks. "If Noerr teaches anything it is that an intent to restrain trade as a *result* of the government action sought . . . does not foreclose protection." Sullivan, Developments in the Noerr Doctrine, 56 Antitrust LJ 361, 362 (1987). As for "deny[ing] . . . meaningful access to the appropriate city administrative and legislative fora," that may render the manner of lobbying improper or even unlawful, but does not necessarily render it a "sham." We did hold in California Motor Transport, supra, that a conspiracy among private parties to monopolize trade by excluding a competitor from participation in the regulatory process did not enjoy Noerr protection. But California Motor Transport involved a context in which the conspirators' participation in the governmental process was itself claimed to be a

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"sham," employed as a means of imposing cost and delay. ("It is alleged that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.'" 404 US, at 512, 30 L Ed 2d 642, 92 S Ct 609.) The holding of the case is limited to that situation. To extend it to a context in which the regulatory process is being invoked genuinely, and not in a "sham" fashion, would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid. Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to Omni of "meaningful access to the appropriate city administrative and legislative fora" was achieved by COA in the course of an attempt to influence governmental action that, far from being a "sham," was if anything more in earnest than it should have been. If the denial was wrongful there may be other remedies, but as for the Sherman Act, the Noerr exemption applies.

Omni urges that if, as we have concluded, the "sham" exception is inapplicable, we should use this case to recognize another exception to Noerr immunity—a "conspiracy" exception, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition. We have left open the possibility of such an exception, see, e.g., Allied Tube, supra, at 502, n 7, 100 L Ed 2d 497, 108 S Ct 1931, as have a number of Courts of Appeals. See, e.g., Oberndorf v Denver, 900 F2d 1434, 1440 (CA10 1990); First American Title Co. of South Dakota v South Dakota Land Title Assn. 714 F2d 1439, 1446, n 6 (CA8 1983), cert denied, 464 US 1042, 79 L Ed 2d 173, 104 S Ct 709 (1984). At least one Court of Appeals has affirmed the existence of such an exception in dicta, see Duke & Co. v Foerster, 521 F2d 1277, 1282 (CA3 1975), and

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the Fifth Circuit has adopted it as holding, see Affiliated Capital Corp. v Houston, 735 F2d 1555, 1566-1568 (1984) (en banc).

[4b] Giving full consideration to this matter for the first time, we conclude that a "conspiracy" exception to Noerr must be rejected. We

need not describe our reasons at length, since they are largely the same as those set forth in Part II above for rejecting a "conspiracy" exception to Parker. As we have described, Parker and Noerr are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government. Insofar as the identification of an immunity-destroying "conspiracy" is concerned, Parker and Noerr generally present two faces of the same coin. The Noerr-invalidating conspiracy alleged here is just the Parker-invalidating conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants. The same factors which, as we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. "It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators' " in *some* sense with the private party urging such action, Metro Cable Co. v CATV of Rockford, Inc. 516 F2d 220, 230 (CA7 1975). And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In Noerr itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that

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"deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." 365 US, at 145, 5 L Ed 2d 464, 81 S Ct 523.

IV

[13a, 14] Under Parker and Noerr, therefore, both the city and COA are entitled to immunity from the federal antitrust laws for their activities relating to enactment of the ordinances. This determination does not entirely resolve the dispute before us, since other activities are at issue in the case with respect to COA. Omni asserts that COA engaged in private anticompetitive actions such as trade libel, the setting of artificially low rates, and inducement to breach of contract. Thus, although the jury's general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability for seeking the ordinances, see Sunkist Growers, Inc. v Winckler & Smith Citrus Products Co. 370 US 19, 29-30, 8 L Ed 2d 305, 82 S Ct 1130 (1962)), if the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

[13b] There also remains to be considered the effect of our judgment upon Omni's claim against COA under the South Carolina Unfair Trade Practices Act. The District Court granted judgment notwithstanding the verdict on this claim as well as the Sherman Act claims; the Court of Appeals reversed on the ground

that "a finding of conspiracy to restrain competition is tantamount to a finding" that the South Carolina law had been violated, 891 F2d, at 1143. Given our reversal of the "conspiracy" holding, that reasoning is no longer applicable.

We leave these remaining questions for determination by the Court of Appeals on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

[499 US 385]

Justice **Stevens,** with whom Justice **White** and Justice **Marshall** join, dissenting.

Section 1 of the Sherman Act provides in part: "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 USC § 1 [15 USCS § 1] (emphasis added). Although we have previously recognized that a completely literal interpretation of the word "every" cannot have been intended by Congress,[1] the Court today carries this recognition to an extreme by deciding that agreements between municipalities, or their officials, and private parties to use the zoning power to confer exclusive privileges in a particular line of commerce are beyond the reach of § 1. History, tradition, and the facts of this case all demonstrate that the Court's attempt to create a "better" and less inclusive Sherman Act, cf. West Virginia

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University Hospitals, Inc. v Casey, 499 US 83, 101, 113 L Ed 2d 68, 111 S Ct 1138, is ill advised.

I

As a preface to a consideration of the "state action" and so-called "Noerr-Pennington" exemptions to the Sherman Act, it is appropriate to remind the Court that one of the classic common-law examples of a prohibited contract in restraint of trade involved an agreement between a public official and a private party. The public official—the Queen of England—had granted one of her

1. Construing the statute in the light of the common law concerning contracts in restraint of trade, we have concluded that only unreasonable restraints are prohibited.

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

"Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. . . . [The Rule of Reason] focuses directly on the challenged restraint's impact on competitive conditions." National Society of Professional Engineers v United States, 435 US 679, 687-688, 55 L Ed 2d 637, 98 S Ct 1355 (1978) (footnotes omitted).

We have also confined the Sherman Act's mandate by holding that the independent actions of the sovereign States and their officials are not covered by the language of the Act. Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943).

subjects a monopoly in the making, importation, and sale of playing cards in order to generate revenues for the crown. A competitor challenged the grant in The Case of Monopolies, 11 Co Rep 84, 77 Eng Rep 1260 (QB 1602), and prevailed. Chief Justice Popham explained on behalf of the bench:

> "The Queen was . . . deceived in her grant; for the Queen . . . intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the Queen meant that the abuse should be taken away, which shall never be by this patent, but potius the abuse will be increased for the private benefit of the patentee, and therefore . . . this grant is void jure Regio." Id., at 87a; 77 Eng Rep, at 1264.

In the case before us today, respondent alleges that the city of Columbia, South Carolina, has entered into a comparable agreement to give respondent a monopoly in the sale of billboard advertising. After a 3-week trial, a jury composed of citizens of the vicinage found that, despite the city fathers' denials, there was indeed such an agreement, presumably motivated in part by past favors in the form of political advertising, in part by friendship, and in part by the expectation of a beneficial future relationship—and in any case, not

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exclusively by a concern for the general public interest.[2] Today the Court acknowledges the anticompetitive consequences of this and similar agreements but decides that they should be exempted from the coverage of the Sherman Act because it fears that enunciating a rule that allows the motivations of public officials to be probed may mean that innocent municipal officials may be harassed with baseless charges. The holding evidences an unfortunate lack of confidence in our judicial system and will foster the evils the Sherman Act was designed to eradicate.

II

There is a distinction between economic regulation, on the one hand, and regulation designed to protect the public health, safety, and environment. In antitrust parlance a "regulated industry" is one in which decisions about prices and output are made not by individual firms, but rather by a public body or a collective process subject to governmental approval. Economic regulation of the motor carrier and airline industries was imposed by the Federal Government in the 1930's; the "deregulation" of those industries did not eliminate all the other types of regulation that continue to protect our safety and environmental concerns.

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2. The jury returned its verdict pursuant to the following instructions given by the District Court:

"So if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case . . . and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws.

"So once again an entity may engage in . . . legitimate lobbying . . . to procure legislati[on] even if the motive behind the lobbying is anti competitive.

"If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue." App 81.

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The antitrust laws reflect a basic national policy favoring free markets over regulated markets.[3] In essence, the Sherman Act prohibits private unsupervised regulation of the prices and output of goods in the marketplace. That prohibition is inapplicable to specific industries which Congress has exempted from the antitrust laws and subjected to regulatory supervision over price and output decisions. Moreover, the so-called "state-action" exemption from the Sherman Act reflects the Court's understanding that Congress did not intend the statute to preempt a State's economic regulation of commerce within its own borders.

The contours of the state-action exemption are relatively well defined in our cases. Ever since our decision in Olsen v Smith, 195 US 332, 49 L Ed 224, 25 S Ct 52 (1904), which upheld a Texas statute fixing the rates charged by pilots operating in the Port of Galveston, it has been clear that a State's decision to displace competition with economic regulation is not prohibited by the Sherman Act. Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943), the case most frequently identified with the state-action exemption, involved a decision by California to substitute sales quotas and price control—the purest form of economic regulation—for competition in the market for California raisins.

In Olsen, the State itself had made the relevant pricing decision. In Parker, the regulation of the marketing of California's

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1940 crop of raisins was administered by state officials. Thus, when a state agency, or the State itself, engages in economic regulation, the Sherman Act is inapplicable. Hoover v Ronwin, 466 US 558, 568-569, 80 L Ed 2d 590, 104 S Ct 1989 (1984); Bates v State Bar of Arizona, 433 US 350, 360, 55 L Ed 2d 810, 97 S Ct 2691 (1977).

Underlying the Court's recognition of this state-action exemption has been respect for the fundamental principle of federalism. As we stated in Parker, 317 US, at 351, 87 L Ed 315, 63 S Ct 307: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

However, this Court recognized long ago that the deference due States within our federal system does not extend fully to conduct undertaken by municipalities. Rather, all sovereign authority "within the geographical limits of the United States" resides with "the Government of the United States, or [with]

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3. "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' Standard Oil Co. v FTC, 340 US 231, 248, 95 L Ed 239, 71 S Ct 240 [(1951)]. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." National Society of Professional Engineers, 435 US, at 695, 55 L Ed 2d 637, 98 S Ct 1355.

the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." United States v Kagama, 118 US 375, 379, 30 L Ed 228, 6 S Ct 1109 (1886).

Unlike States, municipalities do not constitute bedrocks within our system of federalism. And also unlike States, municipalities are more apt to promote their narrow parochial interests "without regard to extraterritorial impact and regional efficiency." Lafayette v Louisiana Power & Light Co., 435 US 389, 404, 55 L Ed 2d 364, 98 S Ct 1123 (1978); see also The Federalist No. 10 (J. Madison) (describing the greater tendency of smaller societies to promote oppressive and narrow interests above the common good). "If municipalities were free to make economic choices counseled solely by their own parochial interests

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and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." Lafayette v Louisiana Power & Light Co., 435 US, at 408, 55 L Ed 2d 364, 98 S Ct 1123. Indeed, "[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." Id., at 412-413, 55 L Ed 2d 364, 98 S Ct 1123.[4]

Nevertheless, insofar as municipalities may serve to implement state policies, we have held that economic regulation administered by a municipality may also be exempt from Sherman Act coverage if it is enacted pursuant to a clearly articulated and affirmatively expressed state directive "to replace competition with regulation." Hoover, 466 US, at 569, 80 L Ed 2d 590, 104 S Ct 1989. However, the mere fact that a municipality acts within its delegated authority is not sufficient to exclude its anti-competitive behavior from the reach of the Sherman Act.

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"Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific

4. In Owen v City of Independence, 445 US 622, 63 L Ed 2d 673, 100 S Ct 1398 (1980), this Court recognized that "notwithstanding [42 USC] § 1983's [42 USCS § 1983's] expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' Pierson v Ray, 386 US 547, 555 [18 L Ed 2d 288, 87 S Ct 1213] (1967)." Id., at 637, 63 L Ed 2d 673, 100 S Ct 1398. Nevertheless, the Court refused to find a firmly established immunity enjoyed by municipal corporations at common law for the torts of their agents. "Where the immunity claimed by the defendant was well established at common law at the time [42 USC] § 1983 [42 USCS § 1983] was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify" according them such immunity. Id., at 638, 63 L Ed 2d 673, 100 S Ct 1398. See also Will v Michigan Dept. of State Police, 491 US 58, 70, 105 L Ed 2d 45, 109 S Ct 2304 (1989) ("States are protected by the Eleventh Amendment while municipalities are not . . .").

anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." Community Communications Co. v Boulder, 455 US 40, 56, 70 L Ed 2d 810, 102 S Ct 835 (1982).

Accordingly, we have held that the critical decision to substitute economic regulation for competition is one that must be made by the State. That decision must be articulated with sufficient clarity to identify the industry in which the State intends that economic regulation shall replace competition. The terse statement of the reason why the municipality's actions in Hallie v Eau Claire, 471 US 34, 85 L Ed 2d 24, 105 S Ct 1713 (1985), was exempt from the Sherman Act illustrates the point: "They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation." Id., at 47, 85 L Ed 2d 24, 105 S Ct 1713.[5]

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III

Today the Court adopts a significant enlargement of the state-action exemption. The South Carolina statutes that confer zoning authority on municipalities in the State do not articulate any state policy to displace competition with economic regulation in any line of commerce or in any specific industry. As the Court notes, the state statutes were expressly adopted to promote the " 'health, safety, morals or the general welfare of the community,' " see ante, at 370, n 3, 113 L Ed 2d, at 392. Like Colorado's grant of "home rule" powers to the city of Boulder, they are simply neutral

5. Contrary to the Court's reading of Hallie, our opinion in that case emphasized the industry-specific character of the Wisconsin legislation in explaining why the delegation satisfied the 'clear articulation' requirement. At issue in Hallie was the town's independent decision to refuse to provide sewage treatment services to nearby towns—a decision that had been expressly authorized by the Wisconsin legislation. 471 US, at 41, 85 L Ed 2d 24, 105 S Ct 1713. We wrote:
"Applying the analysis of Lafayette v Louisiana Power & Light Co., 435 US 389 [55 L Ed 2d 364, 98 S Ct 1123] (1978), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." Id., at 42, 85 L Ed 2d 24, 105 S Ct 1713.
"Nor do we agree with the Towns' contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in Boulder, arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in Boulder is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the 'clear articulation' component of the state action test. The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was." Id., at 43, 85 L Ed 2d 24, 105 S Ct 1713.
We rejected the argument that the delegation was insufficient because it did not expressly mention the foreseeable anticompetitive consequences of the city of Eau Claire's conduct, but we surely did not hold that the mere fact that incidental anticompetitive consequences are foreseeable is sufficient to immunize otherwise unauthorized restrictive agreements between cities and private parties.

on the question whether the municipality should displace competition with economic regulation in any industry. There is not even an arguable basis for concluding that the State authorized the city of Columbia to enter into exclusive agreements with any person, or to use the zoning power to protect favored citizens from competition.[6] Nevertheless, under the guise of acting

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pursuant to a state legislative grant to regulate health, safety, and welfare, the city of Columbia in this case enacted an ordinance that amounted to economic regulation of the billboard market; as the Court recognizes, the ordinance "obviously benefited COA, which already had its billboards in place . . . [and] severely hindered Omni's ability to compete." Ante, at 368, 113 L Ed 2d, at 390.

Concededly, it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare. "Social and safety regulation have economic impacts, and economic regulation has social and safety effects." D. Hjelmfelt, Antitrust and Regulated Industries 3 (1985). It is nevertheless important to determine when purported general welfare regulation in fact constitutes economic regulation by its purpose and effect of displacing competition. "An example of economic regulation which is disguised by another stated purpose is the limitation of advertising by lawyers for the stated purpose of protecting the public from incompetent lawyers. Also, economic regulation posing as safety regulation is often encountered in the health care industry." Id., at 3-4.

In this case, the jury found that the city's ordinance—ostensibly one promoting health, safety, and welfare—was in fact enacted pursuant to an agreement between city officials and a private party to restrict competition. In my opinion such a finding necessarily leads to the conclusion that the city's ordinance was fundamentally a form of economic regulation of the billboard market rather than a general welfare regulation having incidental anticompetitive effects. Because I believe our cases have wisely held that the decision to embark upon economic regulation is a nondelegable one that must expressly be made by the State in the context of a specific industry in order to qualify for state-action immunity, see, e.g., Olsen v Smith, 195 US 332, 49 L Ed 224, 25 S Ct 52 (1904) (Texas pilot-age

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statutes expressly regulated both entry and rates in the Port of Galveston); Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943) (California statute expressly authorized the raisin market regulatory program), I would hold that the city of Columbia's economic regulation of the billboard market pursuant to a general state grant of zoning power is not exempt from antitrust scrutiny.[7]

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6. The authority to regulate the " 'location, height, bulk, number of stories and size of buildings and other structures,' " see ante, at 371, n 3, 113 L Ed 2d, at 392 (citation omitted), may of course have an indirect effect on the total output in the billboard industry, see ante, at 373-374, n 4, 113 L Ed 2d, at 393-394, as well as on a number of other industries, but the Court surely misreads our cases when it implies that a general grant of zoning power represents a clearly articulated decision to authorize municipalities to enter into agreements to displace competition in every industry that is affected by zoning regulation.

7. A number of Courts of Appeals have held that a municipality which exercises its zoning power to further a private agreement to re-

Underlying the Court's reluctance to find the city of Columbia's enactment of the billboard ordinance pursuant to a private agreement to constitute unauthorized economic regulation is the Court's fear that subjecting the motivations and effects of municipal action to antitrust scrutiny will result in public decisions being "made subject to ex post facto judicial assessment of 'the public interest.'" Ante, at 377, 113 L Ed 2d, at 396. That fear, in turn, rests on the assumption that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." Ante, at 375, 113 L Ed 2d, at 395.

The Court's assumption that an agreement between private parties and public officials is an "inevitable" precondition for official action, however, is simply wrong.[8] Indeed, I am
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persuaded that such agreements are the exception rather than the rule, and that they are, and should be, disfavored. The mere fact that an official body adopts a position that is advocated by a private lobbyist is plainly not sufficient to establish an agreement to do so. See Fisher v Berkeley, 475 US 260, 266-267, 89 L Ed 2d 206, 106 S Ct 1045 (1986); cf. Theatre Enterprises, Inc. v Paramount Film Distributing Corp. 346 US 537, 541, 98 L Ed 273, 74 S Ct 257 (1954). Nevertheless, in many circumstances, it would seem reasonable to infer—as the jury did in this case—that the official action is the product of an agreement intended to elevate particular private interests over the general good.

In this case, the city took two separate actions that protected the local monopolist from threatened competition. It first declared a moratorium on any new billboard construction, despite the city attorney's advice that the city had no power to do so. When the moratorium was invalidated in state-court litigation, it was replaced with an apparently valid ordinance that clearly had the effect of creating formidable barriers to entry in the billboard market. Throughout the city's decisionmaking process in enacting the various ordinances, undisputed evidence demonstrated that Columbia Outdoor Advertising, Inc., had met with city officials privately as well as publicly. As the Court of Appeals noted: "Implicit in the jury verdict was a finding that the city was not acting pursuant to the direction or pur-

strain trade is not entitled to state-action immunity. See, e.g., Westborough Mall, Inc. v Cape Girardeau, 693 F2d 733, 746 (CA8 1982) ("Even if zoning in general can be characterized as 'state action,' . . . a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy"); Whitworth v Perkins, 559 F2d 378, 379 (CA5 1977) ("The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade").

8. No such agreement was involved in Hallie v Eau Claire, 471 US 34, 85 L Ed 2d 24, 105 S Ct 1713 (1985). In that case the plaintiffs challenged independent action—the determination of the service area of the city's sewage system—that had been expressly authorized by Wisconsin legislation. The absence of any such agreement provided the basis for our decision in Fisher v Berkeley, 475 US 260, 266-267, 89 L Ed 2d 206, 106 S Ct 1045 (1986) ("The distinction between unilateral and concerted action is critical here. . . . Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1").

poses of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry." 891 F2d 1127, 1133 (CA4 1989).

Judges who are closer to the trial process than we are do not share the Court's fear that juries are not capable of recognizing the difference between independent municipal action and action taken for the sole purpose of carrying out an

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anticompetitive agreement for the private party.[9] See, e.g., In re Japanese Electronic Products Antitrust Litigation, 631 F2d 1069, 1079 (CA3 1980) ("The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules"). Indeed, the problems inherent in determining whether the actions of municipal officials are the product of an illegal agreement are substantially the same as those arising in cases in which the actions of business executives are subjected to antitrust scrutiny.[10]

[499 US 397]

The difficulty of proving whether an agreement motivated a course of conduct should not in itself intimidate this Court into exempting those illegal agreements that are proved by convincing evidence. Rather, the Court should, if it must, attempt to deal with these problems of proof as it has in the past—through heightened evidentiary standards rather than through judicial expansion of exemptions from the Sherman Act. See, e.g., Matsushita Electric Industrial Co. v Zenith Radio Corp. 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348 (1986) (allowing summary judgment where a predatory pricing conspiracy in violation of the Sherman Act was founded largely upon circumstantial evidence); Monsanto Co. v Spray-Rite Service Corp., 465 US 752, 768, 79 L Ed 2d 775, 104

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9. The instructions in this case, fairly read, told the jury that the plaintiff should not prevail unless the ordinance was enacted for the sole purpose of interfering with access to the market. See n 2, supra. Thus, this case is an example of one of the "polar extremes," see ante, at 375, n 5, 113 L Ed 2d, at 395, that juries—as well as Solomon—can readily identify. The mixed motive cases that concern the Court should present no problem if juries are given instructions comparable to those given below. When the Court describes my position as assuming that municipal action that was not prompted "exclusively by a concern for the general public interest" is enough to create antitrust liability, ibid., it simply ignores the requirement that the plaintiff must prove that the municipal action is the product of an anticompetitive agreement with private parties. Contrary to our square holding in Fisher v Berkeley, 475 US 260, 89 L Ed 2d 206, 106 S Ct 1045 (1986), today the Court seems to assume that municipal action which is not entirely immune from antitrust scrutiny will automatically violate the antitrust laws.

10. "There are many obstacles to discovering conspiracies, but the most frequent difficulties are three. First, price-fixers and similar miscreants seldom admit their conspiracy or agree in the open. Often, we can infer the agreement only from their behavior. Second, behavior can sometimes be coordinated without any communication or other observable and reprehensible behavior. Third, the causal connection between an observable, controllable act—such as a solicitation or meeting—and subsequent parallel action may be obscure." 6 P Areeda, Antitrust Law ¶ 1400, at 3-4(1986).
See also Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv L Rev 655 (1962) (1962) (discussing difficulties of condemning parallel anticompetitive action absent explicit agreement among the parties).

S Ct 1464 (1984) (holding that a plaintiff in a vertical price-fixing case must produce evidence which "tends to exclude the possibility of independent action").

Unfortunately, the Court's decision today converts what should be nothing more than an anticompetitive agreement undertaken by a municipality that enjoys no special status in our federalist system into a lawful exercise of public decisionmaking. Although the Court correctly applies principles of federalism in refusing to find a "conspiracy exception" to the Parker state-action doctrine when a State acts in a nonproprietary capacity, it errs in extending the state-action exemption to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety, and welfare. Unlike the previous limitations this Court has imposed on Congress' sweeping mandate in § 1, which found support in our common-law traditions or our system of federalism, see n 1, supra, the Court's wholesale exemption of municipal action from antitrust scrutiny amounts to little more than a bold and disturbing act of judicial legislation

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which dramatically curtails the statutory prohibition against "every" contract in restraint of trade.[11]

IV

Just as I am convinced that municipal "lawmaking that has been infected by selfishly motivated agreement with private interests," ante, at 383, 113 L Ed 2d, at 400, is not authorized by a grant of zoning authority, and therefore not within the state-action exemption, so am I persuaded that a private party's agreement with selfishly motivated public officials is sufficient to remove the antitrust immunity that protects private lobbying under Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc., 365 US 127, 5 L Ed 2d 464, 81 S Ct 523 (1961), and Mine Workers v Pennington, 381 US 657, 14 L Ed 2d 626, 85 S Ct 1585 (1965). Although I agree that the "sham" exception to the Noerr-Pennington rule exempting lobbying activities from the antitrust laws does not apply to the private petitioner's conduct in this case for the reasons stated by the Court in Part III of its opinion, I am satisfied that the evidence in the record is sufficient to support the jury's finding that a conspiracy existed between the private party and the municipal officials in this case so as to remove the private petitioner's conduct from the scope

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11. As the Court previously has noted:
"In 1972, there were 62,437 different units of local government in this country. Of this number 23,885 were special districts which had a defined goal or goals for the provision of one or several services, while the remaining 38,552 represented the number of counties, municipalities, and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State. These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." Lafayette v Louisiana Power & Light Co. 435 US 389, 407-408, 55 L Ed 2d 364, 98 S Ct 1123 (1978) (footnotes omitted).

of Noerr-Pennington antitrust immunity. Accordingly, I would affirm
[499 US 399]
the judgment of the Court of Appeals as to both the city of Columbia and Columbia Outdoor Advertising, Inc.

I respectfully dissent.

[499 US 400]

LARRY JOE POWERS, Petitioner

v

OHIO

499 US 400, 113 L Ed 2d 411, 111 S Ct 1364

[No. 89-5011]

Argued October 9, 1990. Decided April 1, 1991.

Decision: White criminal defendant held to have standing to raise equal protection objection to prosecutor's allegedly race-based exercise of peremptory challenges to exclude black prospective jurors.

SUMMARY

In Batson v Kentucky (1986) 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712—which involved a black, state criminal defendant who had objected to the prosecutor's exercise of peremptory challenges to strike blacks from the jury venire—the United States Supreme Court held that the equal protection clause of the Federal Constitution's Fourteenth Amendment would be violated by a prosecutor's purposefully discriminatory exercise of peremptory challenges to remove from a jury venire members of the defendant's own race. When a prosecutor, during the jury selection process for a white, criminal defendant's Ohio homicide trial, exercised peremptory challenges to remove black venirepersons from the jury, the defendant objected, citing Batson v Kentucky, but the trial court overruled the defendant's objections. The defendant was eventually (1) convicted on counts of murder, aggravated murder, and attempted aggravated murder; and (2) sentenced to a term of imprisonment of 53 years to life. On appeal, the Court of Appeals of Ohio, Franklin County, affirmed the defendant's conviction, despite the defendant's contentions that (1) the prosecutor's allegedly discriminatory use of peremptory challenges violated the equal protection clause; and (2) the defendant's own race was irrelevant to his alleged right to object to the prosecutor's peremptory challenges. The Supreme Court of Ohio then dismissed the defendant's appeal on the ground that the appeal presented no substantial constitutional question.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by KENNEDY, J., joined by WHITE, MARSHALL, BLACKMUN,

Briefs of Counsel, p 800, infra.

Stevens, O'Connor, and SOUTER, JJ., it was held that a criminal defendant may object to the race-based exclusion of jurors effected through peremptory challenges regardless of whether the defendant and the excluded juror share the same race, because a same-race limitation on such a defendant's right to object would conform with neither (1) the substantive guarantees of the equal protection clause and the policies underlying a federal criminal prohibition against discrimination in jury selection (18 USCS § 243), for, under those guarantees and policies, a prosecutor is prohibited from using the state's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race; nor (2) the accepted rules of third-party standing to raise a federal constitutional claim, for, under those rules, the defendant has standing to raise the equal protection claims of the excluded jurors.

SCALIA, J., joined by REHNQUIST, Ch. J., dissenting, expressed the view that (1) the court's holding was a clear departure from prior law; (2) the Supreme Court had never previously held, or even said, that a juror had an equal protection right not to be excluded from a particular case through peremptory challenge; (3) the existence of such a right would call into question the continuing existence of a centuries-old peremptory challenge system that had important beneficial effects; (4) with respect to a defendant's third-party standing to raise the alleged rights of such excluded jurors, the court's holding failed to establish the normal injury-in-fact requirement for third-party standing, which requirement there was no sound basis for abandoning; and (5) even if the exercise of peremptory strikes constituted unlawful discrimination, it was not understandable why the release of a convicted murderer who had not been harmed by those strikes was an appropriate remedy.

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21A Am Jur 2d, Criminal Law §§ 681, 682, 684; 47 Am Jur 2d, Jury §§ 173-176, 180, 233, 235

9 Federal Procedure, L Ed, Criminal Procedure § 22:799

9 Am Jur Proof of Facts 2d 407, Discrimination in Jury Selection—Systematic Exclusion or Underrepresentation of Identifiable Group

30 Am Jur Trials 561, Jury Selection and Voir Dire in Criminal Cases

USCS, Constitution, Amendment 14; 18 USCS § 243

L Ed Digest, Civil Rights §§ 8, 39; Jury § 44

L Ed Index, Equal Protection; Jury and Jury Trial; Third Persons

Index to Annotations, Discrimination; Equal Protection of Law; Jury and Jury Trial; Peremptory Challenges

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Racial discrimination in voting, and validity and construction of remedial legislation—Supreme Court cases. 92 L Ed 2d 809.

Supreme Court's views as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L Ed 2d 1078.

Comment note: Supreme Court's views as to party's standing to assert rights of third persons (jus tertii) in challenging constitutionality of legislation. 50 L Ed 2d 902.

Group or class discrimination in selection of grand or petit jury as prohibited by Federal Constitution—Supreme Court cases. 33 L Ed 2d 783.

Race discrimination—Supreme Court cases. 94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 21 L Ed 2d 915.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights §§ 8, 39; Jury § 44 — peremptory challenges — racial exclusion — standing of criminal defendant of different race

1a-1f. A criminal defendant may object to the race-based exclusion of jurors effected through peremptory challenges regardless of whether the defendant and the excluded juror share the same race, and thus a white, state criminal defendant has standing to object to a prosecutor's allegedly race-based exclusion of black prospective jurors through the use of peremptory challenges, because (1) a same-race limitation on such a defendant's right to object would conform with neither (a) the substantive guarantees of the equal protection clause of the Federal Constitution's Fourteenth Amendment and the policies underlying a federal statutory provision (originally enacted in the Civil Rights Act of 1875 pursuant to the Fourteenth Amendment's enabling clause, and later codified at 18 USCS § 243)—which provision makes it a criminal offense to exclude persons from jury service on account of their race—for, under those guarantees and policies, a prosecutor is prohibited from using the state's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, nor (b) the accepted rules of third-party standing to raise a federal constitutional claim, for, under those rules, the defendant has standing to raise the equal protection claims of the excluded jurors, (2) the allowance of such a defendant's objection is consistent with a course of decisions of long standing directed against racial discrimination in the administration of justice, (3) to bar such an objection because the defendant's race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service, (4) it has been recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded juror and the community at large, (5) the utility of the peremptory challenge system must be accommodated to the command of racial neutrality, and (6) to say that the defendant's race may be relevant to discerning bias in some cases does not mean that the defendant's race will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms; it remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice. (Scalia, J., and Rehnquist, Ch. J., dissented from this holding.)

Civil Rights §§ 8, 9 — jury — racial exclusion — inclusion of same race

2. A criminal defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the state's purposeful conduct; the equal protection clause of the Federal Constitution's Fourteenth Amendment guarantees the defendant that the state will not exclude members of the defendant's race from the jury venire on account of race, or on the false assumption that members of the defendant's

race as a group are not qualified to serve as jurors; although the defendant has no right to a petit jury composed in whole or in part of persons of the defendant's own race, he or she does have a right to be tried by a jury whose members are selected by nondiscriminatory criteria.

Jury § 1 — purpose

3a, 3b. Jury service preserves the democratic element of the law, as jury service guards the rights of the parties and insures continued acceptance of the laws by all the people; in a criminal case, the purpose of the jury system is to impress upon the defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.

Jury § 38 — qualifications

4. States may prescribe relevant qualifications for their jurors.

Civil Rights §§ 5, 8, 39 — racial exclusion — voting — jury venire — service at individual trial

5a-5d. Under the equal protection clause of the Federal Constitution's Fourteenth Amendment, a member of the community may not be excluded from jury service on account of his or her race; whether jury service be deemed a right, a privilege, or a duty, the state may no more extend it to some of its citizens and deny it to others on racial grounds than the state may invidiously discriminate in the offering and withholding of the elective franchise; racial discrimination in the selection of jurors in the context of an individual trial violates these same prohibitions—under the equal protection clause and under the federal criminal prohibition against discrimination in the jury selection process (originally enacted in the Civil Rights Act of 1875, and later codified at 18 USCS § 243)—because (1) a state may not draw up its jury lists pursuant to neutral procedures and then resort to discrimination at other stages in the selection process, and (2) race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage; thus, an individual juror possesses the right not to be excluded from any particular petit jury on account of race; it contravenes accepted equal protection principles to conclude that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror; race cannot be used as a proxy for determining juror bias or competence; a person's race is unrelated to the person's fitness as a juror. (Scalia, J., and Rehnquist, Ch. J., dissented in part from this holding.)

Jury § 36.5 — right to sit

6. An individual juror does not have a right to sit on any particular petit jury.

Civil Rights §§ 2, 8; Jury § 44 — racial classifications — peremptory challenges

7. A prosecutor's race-based peremptory challenges in a state criminal case cannot survive scrutiny, under the equal protection clause of the Federal Constitution's Fourteenth Amendment, simply because members of all races are subject to like treatment, that is, white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors; the suggestion that racial classifications may survive when visited upon all per-

sons is not authoritative and has no place in modern equal protection jurisprudence; racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. (Scalia, J., and Rehnquist, Ch. J., dissented in part from this holding.)

Civil Rights § 8; Jury § 44 — peremptory challenges — racial exclusion — standing of accused

8a-8e. A defendant in a criminal case has third-party standing to raise the equal protection claims of jurors allegedly excluded because of their race through the prosecution's exercise of peremptory challenges, for (1) the discriminatory use of peremptory challenges by the prosecution causes the defendant cognizable injury, and the defendant has a concrete interest in challenging the practice, as racial discrimination in selection of jurors casts doubt upon the integrity of the judicial process; (2) the relationship between the defendant and the excluded jurors is as close as, if not closer than, the other relationships previously recognized to convey third-party standing, where (a) voir dire permits a party to establish a relationship, if not a bond of trust, with the jurors, (b) such relationship continues throughout the entire trial and may in some cases extend to the sentencing as well, (c) both the excluded juror and the defendant have a common interest in eliminating racial discrimination from the courtroom, where (i) the excluded juror suffers a profound personal humiliation, which is heightened by its public character, and (ii) both the excluded juror and the defendant may lose confidence in the court and its verdicts, and (d) the defendant will be a motivated and effective advocate for the excluded jurors' rights, as discrimination in the jury selection process may lead to a reversal of the defendant's conviction; and (3) although individual jurors subjected to racial exclusion have been held to have the legal right to bring suit on their own behalf, as a practical matter such challenges are rare, where (a) potential jurors are not parties to the jury selection process and have no right to be heard, (b) it would be difficult for an individual excluded juror to show a likelihood that the discrimination against him or her at the voir dire stage will recur, and (c) considerable practical barriers to suit exist because of the small financial stake involved and the economic burdens of litigation. (Scalia, J., and Rehnquist, Ch. J., dissented from this holding).

Parties § 3 — interest in controversy

9. In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief premised on the legal rights or interests of third parties; this fundamental restriction on the United States Supreme Court's authority admits of certain, limited exceptions, under which a litigant has the right to bring an action on behalf of a third party, provided that (1) the litigant has suffered an injury-in-fact, thus giving the litigant a sufficiently concrete interest in the outcome of the issue in dispute, (2) the litigant has a close relation to the third party, and (3) there is some hindrance to the third party's ability to protect his or her own interests.

Civil Rights § 8; Jury § 44 — peremptory challenges — racial exclusion — injury to accused

10a-10d. For purposes of determin-

ing whether a criminal defendant has third-party standing to raise the equal protection claims of prospective jurors who have been excluded from the jury by the prosecution's racially discriminatory use of peremptory challenges, the prosecution's practice causes the defendant cognizable injury and the defendant has a concrete interest in challenging the practice, not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant, but because racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt, for (1) the intrusion of racial discrimination into the jury selection process damages both the fact and the perception of the guarantee that the jury acts as a vital check against the wrongful exercise of power by the state and its prosecutors; (2) a prosecutor's active discrimination during the selection process condones violations of the United States Constitution within the very institution entrusted with the Constitution's enforcement, and so invites cynicism respecting the jury's neutrality and obligation to adhere to the law, (3) such cynicism may be aggravated if race is implicated in the trial, either (a) in a direct way, as with an allegedly racial motivation of the defendant or a victim, or (b) in some more subtle manner, as by casting doubt upon the credibility and dignity of a witness, or even upon the standing or due regard of an attorney who appears in the case; (4) a prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings; (5) the overt wrong at the voir dire phase, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and the court to adhere to the law throughout the trial of the case; and (6) a verdict of conviction or acquittal will not be accepted or understood in terms of fairness if the jury is chosen by unlawful means at the outset. (Scalia, J., and Rehnquist, Ch. J., dissented from this holding.)

Jury § 38 — qualifications

11. Jury selection is the primary means by which a court may enforce a criminal defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.

Civil Rights § 4.5 — race discrimination

12. The Federal Constitution's Fourteenth Amendment mandate that race discrimination be eliminated from all official acts and proceedings of the state is most compelling in the judicial system.

Civil Rights §§ 8, 39 — race discrimination — jury

13. The federal statutory prohibition against discrimination in the selection of jurors—which prohibition was originally enacted in the Civil Rights Act of 1875 pursuant to the enabling clause of the Federal Constitution's Fourteenth Amendment, and later codified at 18 USCS § 243—makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution; the courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.

SYLLABUS BY REPORTER OF DECISIONS

During jury selection at his state-court trial for aggravated murder and related offenses, petitioner Powers, a white man, objected to the State's use of peremptory challenges to remove seven black venirepersons from the jury. Powers' objections, which were based on Baston v Kentucky, 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712, were overruled, the empaneled jury convicted him on several counts, and he was sentenced to prison. On appeal, he contended that the State's discriminatory use of peremptories violated, inter alia, the Fourteenth Amendment's Equal Protection Clause, and that his own race was irrelevant to the right to object to the peremptories. The Ohio Court of Appeals affirmed his conviction.

Held: Under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

(a) The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race. See, e.g., Batson, supra, at 84, 90 L Ed 2d 69, 106 S Ct 1712; Holland v Illinois, 493 US 474, 479, 107 L Ed 2d 905, 110 S Ct 803. Contrary to Ohio's contention, racial identity between the objecting defendant and the excluded jurors does not constitute a relevant precondition for a Batson challenge, and would, in fact, contravene the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law. Although Batson did involve such an identity, it recognized that the State's discriminatory use of peremptories harms the excluded jurors by depriving them of a significant opportunity to participate in civil life. 476 US, at 87, 90 L Ed 2d 69, 106 S Ct 1712. Moreover, the discriminatory selection of jurors has been the subject of a federal criminal prohibition since Congress enacted the Civil Rights Act of 1875. Thus, although an individual juror does not have the right to sit on any particular petit jury, he or she does possess the right not to be excluded from one on account of race. This Court rejects, as contrary to accepted equal protection principles, the arguments that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine a juror's objectivity or qualifications, see Batson, supra, at 87, 95 L Ed 2d 69, 106 S Ct 1712, and that race-based peremptory challenges are permissible when visited upon members of all races in equal degree, see Loving v Virginia, 388 US 1, 18 L Ed 2d 1010, 87 S Ct 1817.

(b) A criminal defendant has standing to raise the third-party equal protection claims of jurors excluded by the prosecution because of their race. Cf., e.g., Singleton v Wulff, 428 US 106, 112-116, 49 L Ed 2d 826, 96 S Ct 2868. First, the discriminatory use of peremptory challenges causes the defendant cognizable injury, and he or she has a concrete interest in challenging the practice, because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. Second, the relationship between the defendant

and the excluded jurors is such that he or she is fully as effective a proponent of their rights as they themselves would be, since both have a common interest in eliminating racial discrimination from the courtroom, and there can be no doubt that the defendant will be a motivated, effective advocate because proof of a discriminatorily constituted jury may lead to the reversal of the conviction under Batson, supra, at 100, 90 L Ed 2d 69, 106 S Ct 1712. Third, it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his or her own rights. Thus, the fact that Powers' race differs from that of the excluded jurors is irrelevant to his standing to object to the discriminatory use of peremptories.

Reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, Stevens, O'Connor, and Souter, JJ., joined. Scalia, J., filed a dissenting opinion, in which Rehnquist, C.J., joined. J., filed a dissenting opinion, in which Rehnquist, C. J., joined.

APPEARANCES OF COUNSEL

Robert L. Lane argued the cause for petitioner.
Alan Craig Travis argued the cause for respondent.
Briefs of Counsel, p 800, infra.

OPINION OF THE COURT

[499 US 402]

Justice **Kennedy** delivered the opinion of the Court.

[1a] Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life. Congress recognized this over a century ago in the Civil Rights Act of 1875, which made it a criminal offense to exclude persons from jury service on account of their race. See 18 USC § 243 [18 USCS § 243]. In a trilogy of cases decided soon after enactment of this prohibition, our Court confirmed the validity of the statute, as well as the broader constitutional imperative of race neutrality in jury selection. See Strauder v West Virginia, 100 US 303, 25 L Ed 664 (1880); Virginia v Rives, 100 US 313, 25 L Ed 667 (1880); Ex parte Virginia, 100 US 339, 25 L Ed 676 (1880). In the many times we have confronted the issue since those cases, we have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts. Despite the clarity of these commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist. In this case, petitioner alleges race discrimination in the prosecution's use of peremptory challenges. Invoking the Equal Protection Clause and federal statutory law, and relying upon well-established principles of standing, we hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

I

Petitioner Larry Joe Powers, a white man, was indicted in Franklin County, Ohio, on two counts of aggra-

vated murder and one count of attempted aggravated murder. Each count also included a separate allegation that petitioner had a firearm while committing the offense. Powers pleaded not guilty and invoked his right to a jury trial.

[499 US 403]

In the jury selection process, Powers objected when the prosecutor exercised his first peremptory challenge to remove a black venireperson. Powers requested the trial court to compel the prosecutor to explain, on the record, his reasons for excluding a black person. The trial court denied the request and excused the juror. The State proceeded to use nine more peremptory challenges, six of which removed black venirepersons from the jury. Each time the prosecution challenged a black prospective juror, Powers renewed his objections, citing our decision in Batson v Kentucky, 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986). His objections were overruled. The record does not indicate that race was somehow implicated in the crime or the trial; nor does it reveal whether any black persons sat on petitioner's petit jury or if any of the nine jurors petitioner excused by peremptory challenges were black persons.

The empaneled jury convicted Powers on counts of murder, aggravated murder, and attempted aggravated murder, each with the firearm specifications, and the trial court sentenced him to a term of imprisonment of 53 years to life. Powers appealed his conviction to the Ohio Court of Appeals, contending that the prosecutor's discriminatory use of peremptories violated the Sixth Amendment's guarantee of a fair cross section in his petit jury, the Fourteenth Amendment's Equal Protection Clause, and Article I, §§ 10 and 16, of the Ohio Constitution. Powers contended that his own race was irrelevant to the right to object to the prosecution's peremptory challenges. The Court of Appeals affirmed the conviction, and the Supreme Court of Ohio dismissed Powers' appeal on the ground that it presented no substantial constitutional question.

Petitioner sought review before us, renewing his Sixth Amendment fair-cross-section and Fourteenth Amendment equal protection claims. While the petition for certiorari was pending, we decided Holland v Illinois, 493 US 474, 107 L Ed 2d 905, 110 S Ct 803 (1990). In Holland it was alleged the prosecution had used its peremptory challenges to exclude from the jury members

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of a race other than the defendant's. We held the Sixth Amendment did not restrict the exclusion of a racial group at the peremptory challenge stage. Five members of the Court there said a defendant might be able to make the objection on equal protection grounds. See id., at 488, 107 L Ed 2d 905, 110 S Ct 803 (Kennedy, J., concurring); id., at 490, 107 L Ed 2d 905, 110 S Ct 803 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting); id., at 504, 107 L Ed 2d 905, 110 S Ct 803 (Stevens, J., dissenting). After our decision in Holland, we granted Powers' petition for certiorari limited to the question whether, based on the Equal Protection Clause, a white defendant may object to the prosecution's peremptory challenges of black venirepersons. 493 US 1068, 107 L Ed 2d 1017, 110 S Ct 1109 (1990). We now reverse and remand.

II

[2] For over a century, this Court

has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct. "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, Strauder, [100 US,] at 305, [25 L Ed 664] or on the false assumption that members of his race as a group are not qualified to serve as jurors, see Norris v Alabama, 294 US 587, 599 [79 L Ed 1074, 55 S Ct 579] (1935); Neal v Delaware, 103 US 370, 397 [26 L Ed 567] (1881)." Batson, supra, at 86, 90 L Ed 2d 69, 106 S Ct 1712 (footnote omitted). Although a defendant has no right to a "petit jury composed in whole or in part of persons of [the defendant's] own race," Strauder, 100 US, at 305, 25 L Ed 664, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.

We confronted the use of peremptory challenges as a device to exclude jurors because of their race for the first time in Swain v Alabama, 380 US 202, 13 L Ed 2d 759, 85 S Ct 824 (1965). Swain involved a challenge to the so-called struck jury system, a procedure designed to allow both the prosecution and the defense a maximum number of peremptory challenges. The venire in

[499 US 405]

noncapital cases started with about 35 potential jurors, from which the defense and the prosecution alternated with strikes until a petit panel of 12 jurors remained. The defendant in Swain, who was himself black, alleged that the prosecutor had used the struck jury system and its numerous peremptory challenges for the purpose of excluding black persons from his petit jury. In finding that no constitutional harm was alleged, the Court in Swain sought to reconcile the command of racial neutrality in jury selection with the utility, and the tradition, of peremptory challenges. The Court declined to permit an equal protection claim premised on a pattern of jury strikes in a particular case, but acknowledged that proof of systematic exclusion of black persons through the use of peremptories over a period of time might establish an equal protection violation. Id., at 222-228, 13 L Ed 2d 759, 85 S Ct 824.

We returned to the problem of a prosecutor's discriminatory use of peremptory challenges in Batson v Kentucky. There, we considered a situation similar to the one before us today, but with one exception: Batson, the defendant who complained that black persons were being excluded from his petit jury, was himself black. During the voir dire examination of the venire for Batson's trial, the prosecutor used his peremptory challenges to strike all four black persons on the venire, resulting in a petit jury composed only of white persons. Batson's counsel moved without success to discharge the jury before it was empaneled on the ground that the prosecutor's removal of black venirepersons violated his rights under the Sixth and Fourteenth Amendments. Relying upon the Equal Protection Clause alone, we overruled Swain to the extent it foreclosed objections to the discriminatory use of peremptories in the course of a specific trial. 476 US, at 90-93, 90 L Ed 2d 69, 106 S Ct 1712. In Batson we held that a defendant can raise an equal protection challenge to the use of peremptories at his own trial by showing

that the prosecutor used them for the purpose of excluding members of the defendant's race. Id., at 96, 90 L Ed 2d 69, 106 S Ct 1712.

[499 US 406]

[1b] The State contends that our holding in the case now before us must be limited to the circumstances prevailing in Batson and that in equal protection analysis the race of the objecting defendant constitutes a relevant precondition for a Batson challenge. Because Powers is white, the State argues, he cannot object to the exclusion of black prospective jurors. This limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law.

In Batson, we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been exluded. But we did not limit our discussion in Batson to that one aspect of the harm caused by the violation. Batson "was designed 'to serve multiple ends,' " only one of which was to protect individual defendants from discrimination in the selection of jurors. Allen v Hardy, 478 US 255, 259, 92 L Ed 2d 199, 106 S Ct 2878 (1986) (per curiam) (quoting Brown v Louisiana, 447 US 323, 329, 65 L Ed 2d 159, 100 S Ct 2214 (1980)). Batson recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large. 476 US, at 87, 90 L Ed 2d 69, 106 S Ct 1712.

The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. See Duncan v Louisiana, 391 US 145, 147-158, 20 L Ed 2d 491, 88 S Ct 1444 (1968). In Balzac v Porto Rico, 258 US 298, 66 L Ed 627, 42 S Ct 343 (1922), Chief Justice Taft wrote for the Court:

> "The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." Id., at 310, 66 L Ed 627, 42 S Ct 343.

And, over 150 years ago, Alexis de Tocqueville remarked:

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> "[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society.
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> . . . . .
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> ". . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.
>
> . . . . .
>
> "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ." 1 De-

mocracy in America 334-337 (Schocken 1st ed 1961).

[3a] Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. See Green v United States, 356 US 165, 215, 2 L Ed 2d 672, 78 S Ct 632 (1958) (Black, J., dissenting). It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." Duncan, supra, at 187, 20 L Ed 2d 491, 88 S Ct 1444 (Harlan, J., dissenting). Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

[4, 5a] While States may prescribe relevant qualifications for their jurors, see Carter v Jury Comm'n of Greene County, 396 US 320, 332, 24 L Ed 2d 549, 90 S Ct 518 (1970), a member of the community may not be excluded from jury service on account of his or her race. See Batson, supra, at 84, 90 L Ed 2d 69, 106 S Ct 1712; Swain, 380 US, at 203-204, 13 L Ed 2d 759, 85 S Ct 824; Carter, supra, at 329-330, 24 L Ed 2d 549, 90 S Ct 518; Thiel v Southern Pacific Co. 328 US

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217, 220-221, 90 L Ed 1181, 66 S Ct 984, 166 ALR 1412 (1946); Neal v Delaware, 103 US 370, 386, 26 L Ed 567 (1881); Strauder, 100 US, at 308, 25 L Ed 664. "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." Carter, supra, at 330, 24 L Ed 2d 549, 90 S Ct 518. Over a century ago, we recognized that:

> "The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." Strauder, supra, at 308, 25 L Ed 664.

[5b] Discrimination in the jury selection process is the subject of a federal criminal prohibition, and has been since Congress enacted the Civil Rights Act of 1875. The prohibition has been codified at 18 USC § 243 [18 USCS § 243], which provides:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

In Peters v Kiff, 407 US 493, 33 L Ed 2d 83, 92 S Ct 2163 (1972), Justice White spoke of "the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment." Id., at 507, 33

L Ed 2d 83, 92 S Ct 2163 (opinion concurring in judgment). The Court permitted a white defendant to challenge the systematic exclusion of

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black persons from grand and petit juries. While Peters did not produce a single majority opinion, six of the Justices agreed that racial discrimination in the jury selection process cannot be tolerated and that the race of the defendant has no relevance to his or her standing to raise the claim. See id., at 504-505, 33 L Ed 2d 83, 92 S Ct 2163 (opinion of Marshall, J.); id., at 506-507, 33 L Ed 2d 83, 92 S Ct 2163 (White, J., concurring in judgment).

Racial discrimination in the selection of jurors in the context of an individual trial violates these same prohibitions. A State "may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" Batson, 476 US, at 88, 90 L Ed 2d 69, 106 S Ct 1712 (quoting Avery v Georgia, 345 US 559, 562, 97 L Ed 1244, 73 S Ct 891 (1953)). We so held in Batson, and reaffirmed that holding in Holland. See 493 US, at 479, 107 L Ed 2d 905, 110 S Ct 803. In Holland, the Court held that a defendant could not rely on the Sixth Amendment to object to the exclusion of members of any distinctive group at the peremptory challenge stage. We noted that the peremptory challenge procedure has acceptance in our legal tradition. See id., at 481, 107 L Ed 2d 905, 110 S Ct 803. On this reasoning we declined to permit an objection to the peremptory challenge of a juror on racial grounds as a Sixth Amendment matter. As the Holland Court made explicit, however, racial exclusion of prospective jurors violates the overriding command of the Equal Protection Clause, and "race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage." Id., at 479, 107 L Ed 2d 905, 110 S Ct 803.

[1c, 5c, 6] We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.

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[5d] It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence. "A person's race simply 'is unrelated to his fitness as a juror.'" Batson, supra, at 87, 90 L Ed 2d 69, 106 S Ct 1712 (quoting Thiel v Southern Pacific Co., supra, at 227, 90 L Ed 1181, 66 S Ct 984, 166 ALR 1412 (Frankfurter, J., dissenting)). We may not accept as a defense to racial discrimination the very stereotype the law condemns.

[7] We reject as well the view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other

jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, Plessy v Ferguson, 163 US 537, 41 L Ed 265, 16 S Ct 1138 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. Loving v Virginia, 388 US 1, 18 L Ed 2d 1010, 87 S Ct 1817 (1967).

III

[8a, 9] We must consider whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service in violation of these principles. In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. Department of Labor v Triplett, 494 US 715, 720, 108 L Ed 2d 701, 110 S Ct 1428 (1990); Singleton v Wulff, 428 US 106, 49 L Ed 2d 826, 96 S Ct 2868 (1976). This fundamental restriction on our authority admits of certain, limited exceptions. We have recognized the right of litigants to bring actions on behalf of

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third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, id., at 112, 49 L Ed 2d 826, 96 S Ct 2868; the litigant must have a close relation to the third party, id., at 113-114, 49 L Ed 2d 826, 96 S Ct 2868; and there must exist some hindrance to the third party's ability to protect his or her own interests. Id., at 115-116, 49 L Ed 2d 826, 96 S Ct 2868. See also Craig v Boren, 429 US 190, 50 L Ed 2d 397, 97 S Ct 451 (1976). These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties. See, e.g., Eisenstadt v Baird, 405 US 438, 31 L Ed 2d 349, 92 S Ct 1029 (1972); Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (1965); see also McGowan v Maryland, 366 US 420, 6 L Ed 2d 393, 81 S Ct 1105 (1961). By similar reasoning, we have permitted litigants to raise third-party rights in order to prevent possible future prosecution. See, e.g., Doe v Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739 (1973).

[8b, 10a] The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. See Allen v Hardy, 478 US, at 259, 92 L Ed 2d 199, 106 S Ct 2878 (recognizing a defendant's interest in "neutral jury selection procedures"). This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," Rose v Mitchell, 443 US 545, 556, 61 L Ed 2d 739, 99 S Ct 2993 (1979), and places the fairness of a criminal proceeding in doubt.

[10b, 11] The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. Batson, 476 US, at 86, 90 L Ed 2d 69, 106 S Ct 1712. The intrusion

of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, Rosales-Lopez v United States, 451 US 182, 188 [68 L Ed 2d 22, 101 S Ct 1629] (1981);

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Ham v South Carolina, 409 US 524 [35 L Ed 2d 46, 93 S Ct 848] (1973); Dennis v United States, 339 US 162 [94 L Ed 1364, 70 S Ct 799] (1950), or predisposition about the defendant's culpability, Irvin v Dowd, 366 US 717 [6 L Ed 2d 751, 81 S Ct 1639] (1961)." Gomez v United States, 490 US 858, 873, 104 L Ed 2d 923, 109 S Ct 2237 (1989). Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the cause.

[10c] Unlike the instances where a defendant seeks to object to the introduction of evidence obtained illegally from a third party, see, e.g. United States v Payner, 447 US 727, 65 L Ed 2d 468, 100 S Ct 2439 (1980), here petitioner alleges that the primary constitutional violation occurred during the trial itself. A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The voir dire phase of the trial represents the "jurors' first introduction to the substantive factual and legal issues in a case." Gomez, supra, at 874, 104 L Ed 2d 923, 109 S Ct 2237. The influence of the voir dire process may persist through the whole course of the trial proceedings. Ibid. If the defendant has no right to object to the prosecutor's improper exclusion of jurors, and if the trial court has no duty to make a prompt inquiry when the defendant shows, by adequate grounds, a likelihood of impropriety in the exercise of a challenge, there arise legitimate doubts that the jury has been chosen by proper means. The composition of the

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trier of fact itself is called in question, and the irregularity may pervade all the proceedings that follow.

[3b, 8c, 10d] The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

[8d] We noted in Singleton that in certain circumstances "the relationship between the litigant and the

third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." 428 US, at 115, 49 L Ed 2d 826, 96 S Ct 2868. Here, the relation between petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases. See, e.g., Griswold v Connecticut, supra (Planned Parenthood official and a licensed physician can raise the constitutional rights of contraceptive users with whom they had professional relationships); Craig, supra (licensed beer vendor has standing to raise the equal protection claim of a male customer challenging a statutory scheme prohibiting the sale of beer to males under the age of 21 and to females under the age of 18); Department of Labor v Triplett, 494 US 715, 108 L Ed 2d 701, 110 S Ct 1428 (1990) (attorney may challenge an attorney's fees restriction by asserting the due process rights of the client). Voir dire permits a party to establish a relation, if not a bond of trust, with the jurors. This relation continues throughout the entire trial and may in some cases extend to the sentencing as well.

Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened

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by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights. Petitioner has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for we have recognized that discrimination in the jury selection process may lead to the reversal of a conviction. See Batson, supra, at 100, 90 L Ed 2d 69, 106 S Ct 1712; Vasquez v Hillery, 474 US 254, 264, 88 L Ed 2d 598, 106 S Ct 617 (1986); Rose v Mitchell, supra, at 551, 61 L Ed 2d 739, 99 S Ct 2993; Cassell v Texas, 339 US 282, 94 L Ed 839, 70 S Ct 629 (1950). Thus, " 'there seems little loss in terms of effective advocacy from allowing [the assertion of this claim] by' the present jus tertii champion." Craig, supra, at 194, 50 L Ed 2d 397, 97 S Ct 451 (quoting Singleton, 429 US, at 118, 49 L Ed 2d 826, 96 S Ct 2868).

The final inquiry in our third-party standing analysis involves the likelihood and ability of the third parties, the excluded venirepersons, to assert their own rights. See Singleton, supra, at 115-116, 49 L Ed 2d 826, 96 S Ct 2868. We have held that individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf. Carter, 396 US, at 329-330, 24 L Ed 2d 549, 90 S Ct 518. As a practical matter, however, these challenges are rare. See Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U Chi L Rev 153, 193-195 (1989). Indeed, it took nearly a century after the Fourteenth Amendment and the Civil Rights Act of 1875 came into being for the first such case to reach this Court. See Carter, supra, at 320, 24 L Ed 2d 549, 90 S Ct 518.

The barriers to a suit by an excluded juror are daunting. Potential

jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges.

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Unlike a challenge to systematic practices of the jury clerk and commissioners such as we considered in Carter, it would be difficult for an individual juror to show a likelihood that discrimination against him at the voir dire stage will recur. See Los Angeles v Lyons, 461 US 95, 105-110, 75 L Ed 2d 675, 103 S Ct 1660 (1983). And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation. See Vasquez, supra, at 262, n 5, 88 L Ed 2d 598, 106 S Ct 617; Rose v Mitchell, 443 US, at 558, 61 L Ed 2d 739, 99 S Ct 2993. The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights. See Barrows v Jackson, 346 US 249, 257, 97 L Ed 1586, 73 S Ct 1031 (1953).

[1d, 8e] We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race. In so doing, we once again decline "to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice." Cassell v Texas, supra, at 290, 94 L Ed 839, 70 S Ct 629 (Frankfurter, J., concurring in judgment). To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service. In Holland and Batson, we spoke of the significant role peremptory challenges play in our trial procedures, but we noted also that the utility of the peremptory challenge system must be accommodated to the command of racial neutrality. Holland, 493 US, at 486-487, 107 L Ed 2d 905, 110 S Ct 803; Batson, 476 US, at 98-99, 90 L Ed 2d 69, 106 S Ct 1712.

[1e, 12, 13] The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. Rose v Mitchell, supra, at 555, 61 L Ed 2d 739, 99 S Ct 2993. We have held, for example, that prosecutorial discretion cannot be exercised on the basis of race, Wayte v United States, 470 US 598, 608, 84 L Ed 2d 547, 105 S Ct 1524 (1985), and that, where racial bias is likely to influence a jury, an inquiry must be made into such bias. Ristaino v Ross, 424 US

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589, 596, 47 L Ed 2d 258, 96 S Ct 1017 (1976); see also Turner v Murray, 476 US 28, 90 L Ed 2d 27, 106 S Ct 1683 (1986). The statutory prohibition on discrimination in the selection of jurors, 18 USC § 243 [18 USCS § 243], enacted pursuant to the Fourteenth Amendment's Enabling Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition. See Peters v Kiff, 407 US, at 507, 33 L Ed 2d 83, 92 S Ct 2163 (White, J., concurring in judgment); see also id., at 505, 33 L

Ed 2d 83, 92 S Ct 2163 (opinion of Marshall, J.).

[1f] The emphasis in Batson on racial identity between the defendant and the excused prospective juror is not inconsistent with our holding today that race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges. Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred. But to say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms.

It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice. In this case, the State concedes that, if we find the petitioner has standing to object to the prosecution's use of the peremptory challenges, the case should be remanded. We find that petitioner does have standing. The judgment is reversed, and the case is remanded for further proceedings not inconsistent with our opinion.

It is so ordered.

SEPARATE OPINION

[499 US 417]

Justice **Scalia,** with whom The **Chief Justice** joins, dissenting.

Since in my view today's decision contradicts well-established law in the area of equal protection and of standing, I respectfully dissent.

I

The Court portrays its holding as merely the logical application of our prior jurisprudence concerning equal protection challenges to criminal convictions. It is far from that.

Over a century ago, in Strauder v West Virginia, 100 US 303, 25 L Ed 664 (1880), we held that a statute barring blacks from service on grand or petit juries denied equal protection of the laws to a black man convicted of murder by an all-white jury. Interpreting the recently enacted Fourteenth Amendment, we concluded that the statute violated the black defendant's equal protection right for the following reason:

> "It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of

equal legal protection?" Id., at 309, 25 L Ed 664.

It was not suggested in Strauder, and I am sure it was quite unthinkable, that a *white* defendant could have had his conviction reversed on the basis of the same statute. The statute did not exclude members of *his* race, and thus did not deprive *him* of the equal protection of the laws.

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Since Strauder, we have repeatedly invalidated criminal convictions on equal protection grounds where state laws or practices excluded potential jurors from service on the basis of race. See Vasquez v Hillery, 474 US 254, 88 L Ed 2d 598, 106 S Ct 617 (1986); Castaneda v Partida, 430 US 482, 51 L Ed 2d 498, 97 S Ct 1272 (1977); Alexander v Louisiana, 405 US 625, 31 L Ed 2d 536, 92 S Ct 1221 (1972); Sims v Georgia, 389 US 404, 19 L Ed 2d 634, 88 S Ct 523 (1967) (per curiam); Jones v Georgia, 389 US 24, 19 L Ed 2d 25, 88 S Ct 4 (1967) (per curiam); Whitus v Georgia, 385 US 545, 17 L Ed 2d 599, 87 S Ct 643 (1967); Coleman v Alabama, 377 US 129, 12 L Ed 2d 190, 84 S Ct 1152 (1964); Arnold v North Carolina, 376 US 773, 12 L Ed 2d 77, 84 S Ct 1032 (1964) (per curiam); Eubanks v Louisiana, 356 US 584, 2 L Ed 2d 991, 78 S Ct 970 (1958); Reece v Georgia, 350 US 85, 100 L Ed 77, 76 S Ct 167 (1955); Williams v Georgia, 349 US 375, 99 L Ed 1161, 78 S Ct 814 (1955); Hernandez v Texas, 347 US 475, 98 L Ed 866, 74 S Ct 667 (1954); Avery v Georgia, 345 US 559, 97 L Ed 1244, 73 S Ct 891 (1953); Cassell v Texas, 339 US 282, 94 L Ed 839, 70 S Ct 629 (1950); Patton v Mississippi, 332 US 463, 92 L Ed 76, 68 S Ct 184, 1 ALR2d 1286 (1947); Hill v Texas, 316 US 400, 86 L Ed 1559, 62 S Ct 1159 (1942); Smith v Texas, 311 US 128, 85 L Ed 84, 61 S Ct 164 (1940); Pierre v Louisiana, 306 US 354, 83 L Ed 757, 59 S Ct 536 (1939); Hale v Kentucky, 303 US 613, 82 L Ed 1050, 58 S Ct 753 (1938) (per curiam); Hollins v Oklahoma, 295 US 394, 79 L Ed 1500, 55 S Ct 784 (1935) (per curiam); Norris v Alabama, 294 US 587, 79 L Ed 1074, 55 S Ct 579 (1935); Rogers v Alabama, 192 US 226, 48 L Ed 417, 24 S Ct 257 (1904); Carter v Texas, 177 US 442, 44 L Ed 839, 20 S Ct 687 (1900); Bush v Kentucky, 107 US 110, 27 L Ed 354, 1 S Ct 625 (1883); Neal v Delaware, 103 US 370, 26 L Ed 567 (1881). In *all* these cases, the basis for our decision was that the State had violated the *defendant's* right to equal protection, because it had excluded jurors of *his* race. As we said in Carter v Texas: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied *to him,* contrary to the Fourteenth Amendment of the Constitution of the United States." 177 US, at 447, 44 L Ed 839, 20 S Ct 687 (emphasis added).

Twenty-six years ago, in Swain v Alabama, 380 US 202, 13 L Ed 2d 759, 85 S Ct 824 (1965), we first considered an equal protection claim against peremptory challenges by the prosecution. In that case, a

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black man had been convicted and sentenced to death by an all-white jury, the prosecutor having peremptorily struck six prospective black jurors from the venire. We rejected the

defendant's equal protection claim. Our opinion set forth at length the "very old credentials" of the peremptory challenge, id., at 212, 13 L Ed 2d 759, 85 S Ct 824, see id., at 212-219, 13 L Ed 2d 759, 85 S Ct 824, discussed the reasons for the "long and widely held belief" that it is "a necessary part of trial by jury," id., at 219, 13 L Ed 2d 759, 85 S Ct 824, see id., at 219-221, 13 L Ed 2d 759, 85 S Ct 824, and observed that it is "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty," id., at 220, 13 L Ed 2d 759, 85 S Ct 824. To accept petitioner's equal protection claim, we said, "would establish a rule wholly at odds with the peremptory challenge system as we know it," id., at 222, 13 L Ed 2d 759, 85 S Ct 824, a system in which "Negro and white, Protestant and Catholic, are alike subject to being challenged without cause," id., at 221, 13 L Ed 2d 759, 85 S Ct 824. But while permitting race-based challenges for the traditional purpose of eliminating "irrational . . . suspicions and antagonisms," id., at 224, 13 L Ed 2d 759, 85 S Ct 824, "related to the case [the prosecutor] is trying, the particular defendant involved and the particular crime charged," id., at 223, 13 L Ed 2d 759, 85 S Ct 824, we strongly suggested that it would violate the Equal Protection Clause to use race-based challenges as a surrogate for segregated jury lists, employing them "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim," ibid., in order to "deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population," id., at 224, 13 L Ed 2d 759, 85 S Ct 824.

Five years ago we revisited the issue, and overruled Swain. In Batson v Kentucky, 476 US 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986), we held that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case,*" id., at 95, 90 L Ed 2d 69, 106 S Ct 1712 (emphasis in original), whereupon the prosecution would be required to justify its strikes on race-neutral

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grounds. Batson, however, like all our other cases upholding an equal protection challenge to the composition of criminal juries, referred to—indeed, it *emphasized*—the necessity of racial identity between the defendant and the excluded jurors. "[T]he defendant," we said, "first must show that *he is a member of a cognizable racial group,* and that the prosecutor has exercised peremptory challenges to remove from the venire *members of the defendant's race.*" Id., at 96, 90 L Ed 2d 69, 106 S Ct 1712 (emphasis added; citation omitted). This requirement was repeated several times. "The defendant initially must show that *he* is a member of a racial group capable of being singled out for differential treatment." Id., at 94, 90 L Ed 2d 69, 106 S Ct 1712 (emphasis added). "The Equal Protection Clause guarantees the defendant that the State will not exclude members of *his race* from the jury venire on account of race." Id., at 86, 90 L Ed 2d 69, 106 S Ct 1712 (emphasis added). Justice White, concurring, concluded that the abandonment of Swain was justified because "[i]t appears . . . that the practice of peremptorily eliminating blacks from

petit juries *in cases with black defendants* remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." Id., at 101, 90 L Ed 2d 69, 106 S Ct 1712 (emphasis added). Today's opinion for the Court is correct in noting that Batson asserted that "a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large," ante, at 406, 113 L Ed 2d, at 422. But there is no contradiction, and Batson obviously saw none, between that proposition and the longstanding and reiterated principle that no defendant except one *of the same race as the excluded juror* is deprived of equal protection of the laws.

On only two occasions in the past have we considered claims by a criminal defendant of one race that the prosecution had discriminated against prospective jurors of another race. Last Term, in Holland v Illinois, 493 US 474, 107 L Ed 2d 905, 110 S Ct 803 (1990), we held that the prosecution's use of peremptory strikes against black jurors did not deprive a white defendant of his Sixth Amendment right to an impartial jury. No

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equal protection claim was made in that case. Such a claim was made, however, in Peters v Kiff, 407 US 493, 33 L Ed 2d 83, 92 S Ct 2163 (1972). There the petitioner, a white man, contended that the State, through its use of segregated jury lists, had excluded blacks from his grand and petit juries, thus denying him due process and equal protection. The case produced no majority opinion, but it is significant that *no Justice* relied upon the petitioner's equal protection argument. Justice Marshall, joined by Justice Douglas and Justice Stewart, asserted that a defendant has a due process right not to be subjected "to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner." Id., at 502, 33 L Ed 2d 83, 92 S Ct 2163. Justice White, joined by Justice Brennan and Justice Powell, concluded that "the strong statutory policy" contained in the 1875 criminal statute prohibiting disqualification from jury service on racial grounds, 18 USC § 243 [18 USCS § 243], entitled the petitioner to challenge the exclusion of blacks from the grand jury that indicted him. 407 US, at 507, 33 L Ed 2d 83, 92 S Ct 2163. Chief Justice Burger, joined by Justice Blackmun and then-Justice Rehnquist, contended that there was no basis for assuming that the petitioner had been injured in any way by the alleged discrimination, and noted that "the Court has never intimated that a defendant is the victim of unconstitutional discrimination if he does not claim that members of his own race have been excluded." Id., at 509, 33 L Ed 2d 83, 92 S Ct 2163.

Alexander v Louisiana, 405 US 625, 31 L Ed 2d 536, 92 S Ct 1221 (1972), involved precisely the sort of claim made here, in the context of an alleged denial of equal protection on the basis of sex. In that case, a black male defendant contended that the State's manner of composing its jury lists had excluded blacks and women from his grand jury, thereby denying him equal protection of the laws. We ultimately found it unnecessary to reach his claim regarding the exclusion of women, but only after saying the following:

> "This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The

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constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. . . . [T]here is nothing in past adjudications suggesting that petitioner *himself* has been denied equal protection by the alleged exclusion of women from grand jury service." Id., at 633, 31 L Ed 2d 536, 92 S Ct 1221 (emphasis added).

Similarly, in Castaneda v Partida, 430 US 482, 51 L Ed 2d 498, 97 S Ct 1272 (1977), in holding that the respondent had successfully established a prima facie case of discrimination against Mexican-Americans in the selection of grand jurors, we said that "in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial under-representation of *his race or of the identifiable group to which he belongs.*" Id., at 494, 51 L Ed 2d 498, 97 S Ct 1272 (emphasis added).

Thus, both before and after Batson, and right down to the release of today's opinion, our jurisprudence contained neither a case holding, nor even a dictum suggesting, that a defendant could raise an equal protection challenge based upon the exclusion of a juror of another race; and our opinions contained a vast body of clear statement to the contrary. We had reaffirmed the point just last Term in Holland, supra. After quoting the language from Batson requiring the defendant to show that he is a member of the racial group alleged to have been removed from the jury, we contrasted the requirements for standing under the Fourteenth Amendment's Equal Protection Clause and the Sixth Amendment: "We have never suggested, however, that such a *requirement of correlation* between the group identification of the defendant and the group identification of excluded venire members is necessary for Sixth Amendment standing. *To the contrary,* our cases hold that the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether

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or not the systematically excluded groups are groups to which he himself belongs." 493 US, at 477, 107 L Ed 2d 905, 110 S Ct 803 (emphasis added).

Thus, today's holding cannot be considered in accordance with our prior law. It is a clear departure.

II

In an apparent attempt to portray the question before us as a novel one, the Court devotes a large portion of its opinion to third-party standing—as though that obvious avenue of rendering the Equal Protection Clause applicable had not occurred to us in the many cases discussed above. Granted, the argument goes, that this white defendant has not *himself* been denied equal protection, but he has third-party standing to challenge the denial of equal protection to the stricken black jurors. The Court's discussion of third-party standing is no more faithful to our precedent than its description of our earlier equal protection cases. Before reaching that point, however, there is a prior one: The *first-party* right upon which the Court seeks to *base* third-party standing has not hitherto been held to exist.

All citizens have the equal protection right not to be excluded from *jury service* (i.e., not to be excluded from grand- and petit-jury lists) on the basis of irrelevant factors such as race, Carter v Jury Comm'n of Greene County, 396 US 320, 24 L Ed 2d 549, 90 S Ct 518 (1970), or employment status, cf. Thiel v Southern Pacific Co. 328 US 217, 90 L Ed 1181, 66 S Ct 984, 166 ALR 1412 (1946). As Swain suggested, this principle would also prohibit the systematic exclusion of a particular race or occupation from all jury service through peremptory challenges. When a particular group has been singled out in this fashion, its members have been treated *differently,* and have suffered the deprivation of a right and responsibility of citizenship. But when that group, *like all others,* has been made subject to peremptory challenge on the basis of its group characteristic, its members have been treated not differently but the same. In fact, it would constitute

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discrimination to *exempt* them from the peremptory-strike exposure to which all others are subject. If, for example, men were permitted to be struck but not women, or fundamentalists but not atheists, or blacks but not whites, members of the former groups would plainly be the object of discrimination.

In reply to this, it could be argued that discrimination is not legitimated by being applied, so to speak, indiscriminately; that the unlawfulness of treating one person differently on irrelevant grounds is not erased by subjecting everyone else to the same unlawfulness. The response to this is that the stricken juror has *not* been "treated differently" in the only pertinent sense—that is, in the sense of being deprived of any benefit or subjected to any slight or obloquy. The strike does not deprecate his group, and thereby "stigmatize" his own personality. Unlike the categorical exclusion of a group from jury service, which implies that all its members are incompetent or untrustworthy, a peremptory strike on the basis of group membership implies nothing more than the undeniable reality (upon which the peremptory strike system is largely based) that all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members. Since that reality is acknowledged as to *all* groups, and forms the basis for peremptory strikes as to *all* of them, there is no implied criticism or dishonor to a strike. Nor is the juror who is struck because of his group membership deprived of any benefit. It is obvious, as Strauder acknowledged, that a defendant belonging to an identifiable group is benefited by having members of that group on his jury, but it is impossible to understand how a juror is benefited by sitting in judgment of a member of his own group, rather than of another. All qualified citizens have a civic right, of course, to serve as jurors, but none has the right to serve as a juror in a particular case. Otherwise, we would have to permit stricken jurors to complain not only of peremptory challenges that supposedly deny

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them equal protection, but also of erroneously allowed challenges for cause.

To affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge. As discussed in Swain, "irrelevant" personal characteristics are by defini-

tion the basis for using that device; *relevant* characteristics would produce recusal *for cause*. And as Swain also pointed out, the irrelevant characteristics relied upon are frequently those that would promptly trigger invalidation in other contexts—not only race, but religion, sex, age, political views, economic status. Not only is it implausible that such a permanent and universal feature of our jury-trial system is unconstitutional, but it is unlikely that its elimination would be desirable. The peremptory challenge system has endured so long because it has unquestionable advantages. As we described in Holland, 493 US, at 484, 107 L Ed 2d 905, 110 S Ct 803, it is a means of winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible. In a criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of this device should not be minimized.

Until Batson, our jurisprudence affirmed the categorical validity of peremptory strikes so long as they were not used as a substitute for segregated jury lists. Batson made an exception, but one that was narrow in principle and hence limited in effect. It announced an equal protection right, not of prospective jurors to be seated without regard to their race, but *of defendants* not to be tried by juries from which members of *their* race have been intentionally excluded. While the opinion refers to "[t]he harm" that "discriminatory jury selection" inflicts upon "the excluded juror," 476 US, at 87, 90 L Ed 2d 69, 106 S Ct 1712, that is not a clear recognition, even in dictum, that the excluded juror has his own cause of action—any more than its accompanying reference to the harm inflicted upon "the entire community," ibid., suggests that the entire community

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has a cause of action. To the contrary, an independent cause of action on the juror's part is quite incompatible with the opinion's repeated insistence that the stricken juror must be *of the same race* as the defendant. It would be absurd to suppose that a black juror has a right not to be discriminated against, through peremptory strike, in the trial of a black defendant, but not in the trial of a white defendant.

In sum, we have *never* held, or even said, that a juror has an equal protection right not to be excluded from a particular case through peremptory challenge; and the existence of such a right would call into question the continuing existence of a centuries-old system that has important beneficial effects. Thus, even if the Court's discussion of Powers' third-party standing to raise the rights of stricken jurors were correct, it would merely replace the mystery of why *he* has a cause of action with the mystery of why *they* do.

III

In any event, the Court's third-party standing analysis is not correct. The Court fails to establish what we have described as the very first element of third-party standing: the requirement of "injury in fact." See, e.g., Caplin & Drysdale, Chartered v United States, 491 US 617, 623, n 3, 105 L Ed 2d 528, 109 S Ct 2646, 109 S Ct 2667 (1989); Secretary of State of Maryland v Joseph H. Munson Co. 467 US 947, 954-955, 81

L Ed 2d 786, 104 S Ct 2839 (1984). The Court's attempt at constructing an injury in fact to petitioner goes as follows: When the prosecution takes race into account in exercising its peremptory challenges, it "casts doubt on the integrity of the judicial process," and "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law," ante, at 411, 412, 113 L Ed 2d, at 425, 426 (internal quotations omitted), as a result of which "[t]he verdict will not be accepted or understood [as fair]," ante, at 413, 113 L Ed 2d, at 426. The Court must, of course, speak in terms of the *perception* of fairness rather than its reality, since only last Term we held categorically that the exclusion of members of a particular race from a jury does *not* produce

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an unfair jury, and suggested that in some circumstances it may increase fairness. See Holland, supra, at 480-481, 107 L Ed 2d 905, 110 S Ct 803. But in any event, how do these alleged perceptions of unfairness, these "castings of doubt" and "invitations to cynicism," establish that the defendant has been injured *in fact?* They plainly do not. Every criminal defendant objecting to the introduction of some piece of evidence or to some trial procedure on the ground that it violates the rights of a third party can claim a similar "perception of unfairness," but we deny standing. "Injury in perception" would seem to be the very *antithesis* of "injury in fact." As the very words suggest, the latter sort of injury must be "distinct *and palpable,*" Warth v Seldin, 422 US 490, 501, 45 L Ed 2d 343, 95 S Ct 2197 (1975) (emphasis added), "particular *[and] concrete,*" United States v Richardson, 418 US 166, 177, 41 L Ed 2d 678, 94 S Ct 2940 (1974) (emphasis added), "specific *[and] objective,*" Laird v Tatum, 408 US 1, 14, 33 L Ed 2d 154, 92 S Ct 2318 (1972) (emphasis added). Today's opinion makes a mockery of that requirement. It does not even pretend that the peremptory challenges here have caused this defendant tangible injury and concrete harm—but rather (with careful selection of both adjectives and nouns) only a "*cognizable* injury," producing a "concrete *interest* in challenging the practice." Ante, at 411, 113 L Ed 2d, at 425 (emphasis added). I have no doubt he now has a cognizable injury; the Court has made it true by saying so. And I have no doubt he has a concrete interest in challenging the practice at issue here; he would have a concrete interest in challenging a mispronunciation of one of the jurors' names, if that would overturn his conviction. But none of this has anything to do with injury in fact.

In response, however, it could be asserted that the requirement of injury in fact—and, more specifically, that element of the requirement which demands that the cause-and-effect relationship between the illegality and the alleged harm be *more than speculative,* see Allen v Wright, 468 US 737, 750-752, 82 L Ed 2d 556, 104 S Ct 3315 (1984); Simon v Eastern Kentucky Welfare Rights Organization, 426 US 26, 40-46, 48 L Ed 2d 450, 96 S Ct 1917 (1976)—has

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never been applied to a litigant's claim of illegality relating to an aspect of criminal or civil procedure. The available concrete injury in such cases, of course, is the conviction or judgment—or more precisely, the punishment that attends the conviction and the economic or other loss that attends the judgment. But courts have never required that injury to be connected with the alleged

procedure-related illegality by anything more than speculation. If, for example, one of the elements of criminal due process has been denied, or one of the constitutionally specified attributes of a prosecution has been omitted, we do not require the defendant to establish, by more than speculation, that he would not otherwise have been convicted. To the contrary, standing is accorded, and relief will be granted unless the government can establish beyond a reasonable doubt that the error was harmless. See, e.g., Rose v Clark, 478 US 570, 92 L Ed 2d 460, 106 S Ct 3101 (1986).

We do not, however, extend this special treatment of injury in fact in the litigation context to third-party standing. Indeed, we do not even *recognize* third-party standing in the litigation context—that is, permit a civil or criminal litigant to upset an adverse judgment because the process by which it was obtained involved the violation of someone else's rights—even when the *normal* injury-in-fact standard is amply met. If, for example, the *only* evidence supporting a conviction (so that the causality is not remotely speculative) consists of the fruit of a search and seizure that violated a third party's Fourth Amendment rights, we will not permit those rights to be asserted by the defendant. See, e.g., Rawlings v Kentucky, 448 US 98, 65 L Ed 2d 633, 100 S Ct 2556 (1980); United States v Payner, 447 US 727, 65 L Ed 2d 468, 100 S Ct 2439 (1980); Rakas v Illinois, 439 US 128, 58 L Ed 2d 387, 99 S Ct 421 (1978). We would reach the same result with respect to reliable evidence obtained in violation of another person's Fifth Amendment right against self-incrimination, cf. id., at 140, n 8, 58 L Ed 2d 387, 99 S Ct 421. Likewise (assuming we follow the common law) with respect to evidence introduced in violation of someone else's confidentiality privilege. See, e.g., Commonwealth v McKenna,

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206 Pa 317, 322, 213 A2d 223, 226 (1965); Butz v State, 221 Md 68, 73, 156 A2d 423, 426 (1959); see generally Annot, 2 ALR2d 645 (1948). These cases can, to be sure, be explained on the basis that the rights in question are "personal," rather than on the basis of lack of third-party standing, but the result comes to the same. It is difficult to accept the proposition that, even though introduction of the fruits of a third party's illegally obtained confession, which unquestionably produces the defendant's conviction, is not a ground for reversal, racial discrimination against a prospective juror, which only speculatively produces the conviction, is. There is, in short, no sound basis for abandoning the normal injury-in-fact requirements applicable to third-party standing, and supplanting them with an "interest in challenging the practice" standard, simply because a trial-related violation is at issue. If anything, that consideration should lead to the conclusion that there is no third-party standing at all.

IV

Last Term, in Holland, we noted that "[t]he tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, . . . was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, . . . was recognized in an opinion by Justice Story to be part of the common law of the United States, . . . and has

endured through two centuries in all the States. . . ." 493 US, at 481, 107 L Ed 2d 905, 110 S Ct 803. We concluded from this that "[a]ny theory of the Sixth Amendment leading to [the] result" that "each side may not . . . use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side" is "implausible." Ibid. What is true with respect to the Sixth Amendment is true with respect to the Equal Protection Clause as well.

Batson was, as noted earlier, a clear departure from our jurisprudence, and the precise scope of the exception it has

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created remains to be determined. It is unclear, for example, whether it applies to government peremptories in civil cases; whether it applies to peremptories by parties other than the government; and whether it applies to peremptories based on the defendant's sex, religion, age, economic status and *any other* personal characteristic unrelated to the capacity for responsible jury service. All these extensions are arguably within the logic of the decision. This case, however, involves not a clarification of Batson, but the creation of an additional, *ultra*-Batson departure from established law. Petitioner seeks not some further elaboration of the right to have his racial identity disregarded in the selection of his jury, but rather the announcement of a new right to have his jury immune from the exclusion of people of *any* race; or the announcement of a new power to assert a new right of jurors never to be excluded from any jury on the basis of their race. Not only does this exceed the rationale of Batson, but it exceeds Batson's emotional and symbolic justification as well. Notwithstanding history, precedent, and the significant benefits of the peremptory-challenge system, it is intolerably offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded. I am unmoved, however, and I think most Americans would be, by this white defendant's complaint that he was sought to be tried by an all-white jury, or that he should be permitted to press black jurors' unlodged complaint that they were not allowed to sit in judgment of him.

The Court's decision today is unprecedented in law, but not in approach. It is a reprise, so to speak, of Miranda v Arizona, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974 (1966), in that the Court uses its key to the jailhouse door not to free the arguably innocent, but to threaten release upon the society of the unquestionably guilty unless law enforcement officers take certain steps that the Court newly announces to be required by law. It goes beyond Miranda, however, in that there, at least, the mandated

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steps related to the defendant's own rights, if not to his guilt. Here they relate to neither. The sum and substance of the Court's lengthy analysis is that, since a denial of equal protection to other people occurred at the defendant's trial, though it did not affect the fairness of that trial, the defendant must go free. Even if I agreed that the exercise of peremptory strikes constitutes unlawful discrimination (which I do not), I would not understand why the release of a convicted murderer who has not been harmed by those strikes is an appropriate remedy.

Judging from the Court's opinion,

we can expect further, wide-ranging use of the jailhouse key to combat discrimination. Convictions are to be overturned, apparently, *whenever* "race is implicated in the trial"—"by casting doubt upon the credibility or dignity of a witness, or . . . upon the standing or due regard of an attorney who appears in the cause," or even by suggesting "an alleged racial motivation of the defendant or a victim." Ante, at 412, 113 L Ed 2d, at 426. To me this makes no sense. Lofty aims do not justify every step intended to achieve them. Today's supposed blow against racism, while enormously self-satisfying, is unmeasured and misdirected. If for any reason the State is unable to reconvict Powers for the double murder at issue here, later victims may pay the price for our extravagance. Even if such a tragedy, in this or any case, never occurs, the prosecutorial efforts devoted to retrials will necessarily be withheld from other endeavors, as will the prosecutorial efforts devoted to meeting the innumerable Powers claims that defendants of all races can be relied upon to present—again with the result that crime goes unpunished and criminals go free.

I respectfully dissent.

MEMORANDUM CASES

No. 90-967. Guy Wooddell, Jr., Petitioner v International Brotherhood of Electrical Workers, Local 71, et al.

499 US 933, 113 L Ed 2d 440, 111 S Ct 1408.

March 21, 1991. The order entered February 19, 1991, is modified to read as follows: The petition for a writ of certiorari is granted limited to Question I presented by the petition. In addition, the parties are directed to brief and argue the following question: "Does Section 301 of the Labor Management Relations Act create a federal cause of action under which a union member may sue his union for violation of the union constitution?"

No. 90-1244. State Democratic Executive Committee of Alabama, Appellant v Thomas Hawthorne, et al.

499 US 933, 113 L Ed 2d 440, 111 S Ct 1408.

March 25, 1991. Appeal from the United States District Court for the Middle District of Alabama. The judgment is vacated and the case is remanded to the United States District Court for the Middle District of Alabama with directions to dismiss. United States v Munsingwear, Inc. 340 US 36, 95 L Ed 36, 71 S Ct 104 (1950).

Same case below, 750 F Supp 1090.

No. 89-1230. City of Chicago, et al., Petitioners v Walter Friedrich

499 US 933, 113 L Ed 2d 440, 111 S Ct 1383.

March 25, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of West Virginia University Hospitals, Inc. v Casey, 499 US 83, 113 L Ed 2d 68, 111 S Ct 1138 (1991).

Same case below, 888 F2d 511.

No. 90-400. Pete Le'Mon, Petitioner v National Labor Relations Board

499 US 933, 113 L Ed 2d 440, 111 S Ct 1383.

March 25, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of Air Line Pilots Association, International v O'Neill, 499 US 65, 113 L Ed 2d 51, 111 S Ct 1127 (1991), and

United Steelworkers of America, AFL-CIO-CLC v Rawson, 495 US 362, 109 L Ed 2d 362, 110 S Ct 1904 (1990).

Same case below, 902 F2d 810.

No. 90-1010. John J. Dillon, III, Commissioner, Indiana Department of Insurance, et al., Petitioners v Alleghany Corporation, et al.

499 US 933, 113 L Ed 2d 441, 111 S Ct 1383.

March 25, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit with directions to dismiss. United States v Munsingwear, Inc. 340 US 36, 95 L Ed 36, 71 S Ct 104 (1950).

No. A-421 (90-7201). Ricardo Borroto and Estella Borrotto, Petitioners v United States

499 US 934, 113 L Ed 2d 441, 111 S Ct 1386.

March 25, 1991. The application for stay addressed to Justice Scalia and referred to the Court is denied.

No. D-930. In the Matter of Disbarment of Donald L. Hobson

499 US 934, 113 L Ed 2d 441, 111 S Ct 1383.

March 25, 1991. Disbarment order entered.

No. D-932. In the Matter of Disbarment of Charles L. Bussey, Jr.

499 US 934, 113 L Ed 2d 441, 111 S Ct 1383.

March 25, 1991. Disbarment order entered.

No. D-984. In the Matter of Disbarment of Gene Flinn

499 US 934, 113 L Ed 2d 441, 111 S Ct 1384.

March 25, 1991. It is ordered that Gene Flinn, of Miami, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-985. In the Matter of Disbarment of Michael J. Rogers

499 US 934, 113 L Ed 2d 441, 111 S Ct 1384.

March 25, 1991. It is ordered that Michael J. Rogers, of Burleson, Texas, be suspended from the practice of law in this Court and that a rule issue, returnable within forty

days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-986. In the Matter of Disbarment of Kenneth Paul Zauber

499 US 934, 113 L Ed 2d 442, 111 S Ct 1384.

March 25, 1991. It is ordered that Kenneth Paul Zauber, of North Brunswick, New Jersey, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-987. In the Matter of Disbarment of F. Michael Ballard

499 US 934, 113 L Ed 2d 442, 111 S Ct 1384.

March 25, 1991. It is ordered that F. Michael Ballard, of Fairfax, Virginia, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89-1905. Wisconsin Public Intervenor, et al., Petitioners v Ralph Mortier, et al.

499 US 934, 113 L Ed 2d 442, 111 S Ct 1384.

March 25, 1991. The motion of respondents to permit California to participate in oral argument as amicus curiae and for divided argument is denied.

No. 90-622. Florida, Petitioner v Enio Jimeno, et al.

499 US 934, 113 L Ed 2d 442, 111 S Ct 1385.

March 25, 1991. The motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae, out of time, is denied. The motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument is denied.

No. 90-757. Ronald Chisom, et al., Petitioners v Charles E. Roemer, Governor of Louisiana, et al.

No. 90-1032. United States, Petitioner v Charles E. Roemer, Governor of Louisiana, et al.

499 US 935, 113 L Ed 2d 442, 111 S Ct 1385.

March 25, 1991. The motion of the Solicitor General for divided argument is granted.

No. 90-813. Houston Lawyers' Association, et al., Petitioners v Attorney General of Texas, et al.

No. 90-974. League of United Latin American Citizens, et al., Petitioners v Attorney General of Texas, et al.

499 US 935, 113 L Ed 2d 443, 111 S Ct 1385.

March 25, 1991. The motion of respondent Sharolyn Wood for divided argument is denied. The motion of respondent F. Harold Entz for divided argument is denied.

No. 90-952. Janice G. Clark, et al., Appellants v Charles "Buddy" Roemer, Governor of Louisiana, et al.

499 US 935, 113 L Ed 2d 443, 111 S Ct 1386.

March 25, 1991. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 90-5721. Pervis Tyrone Payne, Petitioner v Tennessee

499 US 935, 113 L Ed 2d 443, 111 S Ct 1386.

March 25, 1991. The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is granted.

No. 90-1038. Thomas Cipollone, Individually and as Executor of the Estate of Rose D. Cipollone, Petitioner v Liggett Group, Inc., et al.

499 US 935, 113 L Ed 2d 443, 111 S Ct 1386.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted.

Same case below, 893 F2d 541.

No. 90-695. R. Stuart Huff, Trustee, Petitioner v Standard Life Insurance Company

499 US 936, 113 L Ed 2d 443, 111 S Ct 1386.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 897 F2d 1072.

No. 90-764. Mark Fischer, Petitioner v Ohio

499 US 936, 113 L Ed 2d 443, 111 S Ct 1386.

March 25, 1991. Petition for writ of certiorari to the Court of Appeals of Ohio, Cuyahoga County, denied.

No. 90-782. Bob Odom, et al., Petitioners v Donald M. Johnson

499 US 936, 113 L Ed 2d 443, 111 S Ct 1387.

March 25, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 910 F2d 1273.

No. 90-810. Roland C. Dart, III, et al., Petitioners v James Forrester

499 US 936, 113 L Ed 2d 444, 111 S Ct 1387.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 908 F2d 976.

No. 90-878. Bobby Joe Johnson, Petitioner v Alabama

499 US 936, 113 L Ed 2d 444, 111 S Ct 1387.

March 25, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Alabama denied.

Same case below, 564 So 2d 108.

No. 90-996. Colorado Interstate Gas Company, Petitioner v Federal Energy Regulatory Commission, et al.

499 US 936, 113 L Ed 2d 444, 111 S Ct 1387.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 904 F2d 1456.

No. 90-1025. John A. Mmahat and Mmahat & Duffy, Petitioners v Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Fund

499 US 936, 113 L Ed 2d 444, 111 S Ct 1387.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 907 F2d 546.

No. 90-1037. John Moore, Petitioner v Regents of the University of California, et al.

499 US 936, 113 L Ed 2d 444, 111 S Ct 1388.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

Same case below, 51 Cal 3d 120, 793 P2d 479.

No. 90-1046. Barbara Zamlen, et al., Petitioners v City of Cleveland, et al.

499 US 936, 113 L Ed 2d 444, 111 S Ct 1388.

March 25, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 906 F2d 209.

No. 90-1049. John H. Baker, et al., Petitioners v Federal Aviation Administration, et al.

499 US 936, 113 L Ed 2d 445, 111 S Ct 1388.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 917 F2d 318.

No. 90-1063. Haulaway Incorporated, et al., Petitioners v Lynn Martin, Secretary of Labor

499 US 936, 113 L Ed 2d 445, 111 S Ct 1388.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 914 F2d 242.

No. 90-1064. James B. Rutland, Petitioner v United States

499 US 936, 113 L Ed 2d 445, 111 S Ct 1388.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 907 F2d 489.

No. 90-1069. South Half of Lot 7 and Lot 8, Block 14, Kountze's 3rd Addition to the City of Omaha, et al., Petitioners v United States

499 US 936, 113 L Ed 2d 445, 111 S Ct 1389.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 910 F2d 488.

No. 90-1214. Deen Thomas Williamson, Petitioner v Abilene Independent School District, et al.

499 US 937, 113 L Ed 2d 445, 111 S Ct 1389, reh den (US) 114 L Ed 2d 474, 111 S Ct 2070.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 561.

No. 90-1216. Transportation Communications International Union, Petitioner v MT Properties, Inc.

499 US 937, 113 L Ed 2d 445, 111 S Ct 1389.

March 25, 1991. Petition for writ of certiorari to the United States

Court of Appeals for the Eighth Circuit denied.

Same case below, 914 F2d 1083.

No. 90-1219. Fred J. Tocco, Petitioner v New Jersey Council on Affordable Housing, et al.

499 US 937, 113 L Ed 2d 446, 111 S Ct 1389.

March 25, 1991. Petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division, denied.

Same case below, 242 NJ Super 218, 576 A2d 328.

No. 90-1220. Sam Polur, Petitioner v Hyman Raffe, et al.

499 US 937, 113 L Ed 2d 446, 111 S Ct 1389.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 912 F2d 52.

No. 90-1221. Litton Industrial Automation Systems, Inc., et al., Petitioners v General Electric Company

499 US 937, 113 L Ed 2d 446, 111 S Ct 1390, reh den (US) 114 L Ed 2d 91, 111 S Ct 1697.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 920 F2d 1415.

No. 90-1224. Mark J. Contreras, et al., Petitioners v Citibank (South Dakota), et al.

499 US 937, 113 L Ed 2d 446, 111 S Ct 1390.

March 25, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

Same case below, 198 Ill App 3d 1059, 556 NE2d 751.

No. 90-1227. Richard A. Delgaudio, et al., Petitioners v Benjamin N. A. Kendrick, Judge, Circuit Court of Arlington County, Virginia

499 US 937, 113 L Ed 2d 446, 111 S Ct 1390.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Virginia denied.

No. 90-1228. Tammy S. Fyke, Petitioner v Illinois

499 US 937, 113 L Ed 2d 446, 111 S Ct 1390.

March 25, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Fifth District, denied.

Same case below, 195 Ill App 3d 1113, 582 NE2d 329.

No. 90-1235. Jet Charter Service, Inc., Petitioner v Banque Paribas (Suisse), S.A.

499 US 937, 113 L Ed 2d 447, 111 S Ct 1390.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 907 F2d 1110.

No. 90-1236. Laura L. Phelps, Petitioner v Grant Matthews, aka Leslie A. Johnson, et al.

499 US 937, 113 L Ed 2d 447, 111 S Ct 1391.

March 25, 1991. Petition for writ of certiorari to the Court of Appeals of Colorado denied.

No. 90-1238. Leslie R. Derstein, Petitioner v Page Benson, et al.

499 US 937, 113 L Ed 2d 447, 111 S Ct 1391.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 915 F2d 1410.

No. 90-1245. Anne Elisabeth Koller, Petitioner v Richardson-Merrell, Inc.

499 US 937, 113 L Ed 2d 447, 111 S Ct 1391.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

No. 90-1248. Chance Cordrey, a Minor and Karen Cordrey, et vir, on Behalf of Their Minor Son, Petitioners v R. J. Euckert, Superintendent, Evergreen Local School District, et al.

499 US 938, 113 L Ed 2d 447, 111 S Ct 1391.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 1460.

No. 90-1277. Charles R. Cramer, Jr., et al., Petitioners v Association Life Insurance Company, Inc.

499 US 938, 113 L Ed 2d 447, 111 S Ct 1391.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Louisiana denied.

Same case below, 569 So 2d 533.

No. 90-1310. Clarence David Karnes, Petitioner v United States

499 US 938, 113 L Ed 2d 448, 111 S Ct 1391.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 958.

No. 90-1316. Carolyn Pratt Perry, Petitioner v Commissioner of Internal Revenue

499 US 938, 113 L Ed 2d 448, 111 S Ct 1392.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 912 F2d 1466.

No. 90-1327. Palm Court, Inc., et al., Petitioners v District Court of Appeal of Florida, Fourth District, et al.

499 US 938, 113 L Ed 2d 448, 111 S Ct 1392.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Florida denied.

Same case below, 574 So 2d 142.

No. 90-1336. Daniel H. Bennett, Petitioner v Bob Graham, Former Governor of Florida, et al.

499 US 938, 113 L Ed 2d 448, 111 S Ct 1392.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-6457. Robert A. Haglund, Petitioner v Nevada

499 US 938, 113 L Ed 2d 448, 111 S Ct 1392.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Nevada denied.

Same case below, 106 Nev 1024, 835 P2d 41.

No. 90-6461. Freddy Bernard McClendon, Petitioner v Illinois

499 US 938, 113 L Ed 2d 448, 111 S Ct 1392.

March 25, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Fourth District, denied.

Same case below, 197 Ill App 3d 472, 554 NE2d 791.

No. 90-6497. Errol Flynn James, Petitioner v Dropsie College, aka Annenberg Research Institute

499 US 938, 113 L Ed 2d 448, 111 S Ct 1392, reh den (US) 114 L Ed 2d 131, 111 S Ct 2047.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 914 F2d 243.

No. 90-6549. Donald Eugene Halpin, Petitioner v Bob Martinez, et al.

499 US 938, 113 L Ed 2d 449, 111 S Ct 1393.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Florida denied.

Same case below, 601 So 2d 552.

No. 90-6603. Steven A. Nori, Petitioner v Andrew Maloney, et al.

499 US 938, 113 L Ed 2d 449, 111 S Ct 1393.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 842.

No. 90-6685. Eduardo Ignacio Munio, Petitioner v United States

499 US 938, 113 L Ed 2d 449, 111 S Ct 1393.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 909 F2d 436.

No. 90-6712. John McConnell, Petitioner v United States

499 US 938, 113 L Ed 2d 449, 111 S Ct 1393.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 903 F2d 566.

No. 90-6778. Murray Shulman, Petitioner v Louis W. Sullivan, Secretary of Health and Human Services

499 US 938, 113 L Ed 2d 449, 111 S Ct 1393.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 914 F2d 239.

No. 90-6898. Jorge Alonso Granado, Petitioner v United States

499 US 939, 113 L Ed 2d 449, 111 S Ct 1393.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 28.

No. 90-6908. Charles Stringer, Petitioner v J. T. Johnson

499 US 939, 113 L Ed 2d 450, 111 S Ct 1394.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-6945. Derek Vinson, Petitioner v R. Cooper, et al.

499 US 939, 113 L Ed 2d 450, 111 S Ct 1394.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 921 F2d 274.

No. 90-6948. Theodore W. Robinson, Petitioner v Eugene Sawyer, Mayor, City of Chicago, Illinois, et al.

499 US 939, 113 L Ed 2d 450, 111 S Ct 1394.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

No. 90-6953. Robert Anderson Baugh, Petitioner v John E. Nagle, Warden, et al.

499 US 939, 113 L Ed 2d 450, 111 S Ct 1394.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 920 F2d 12.

No. 90-6954. Gerald Francis, Petitioner v Robert Hoke, Warden

499 US 939, 113 L Ed 2d 450, 111 S Ct 1394.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 844.

No. 90-6958. Dale Oatess, Petitioner v Martin Dragovich, et al.

499 US 939, 113 L Ed 2d 450, 111 S Ct 1394.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-6972. Michael White, Petitioner v Terry L. Morris, Warden

499 US 939, 113 L Ed 2d 450, 111 S Ct 1395.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 179.

No. 90-6975. John Kim, Petitioner v Edwin Printemps

499 US 939, 113 L Ed 2d 451, 111 S Ct 1395.

March 25, 1991. Petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, denied.

No. 90-6976. John Kim, Petitioner v State Bar of California

499 US 939, 113 L Ed 2d 451, 111 S Ct 1395.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-6979. Michael Lynn Brown, Petitioner v Virginia, et al.

499 US 939, 113 L Ed 2d 451, 111 S Ct 1395, reh den (US) 114 L Ed 2d 132, 111 S Ct 2048.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 557.

No. 90-6983. Woodrow Williams, et ux., Petitioners v Bernard Kanstoroom, et al.

499 US 939, 113 L Ed 2d 451, 111 S Ct 1395, reh den (US) 114 L Ed 2d 92, 111 S Ct 1699.

March 25, 1991. Petition for writ of certiorari to the Court of Special Appeals of Maryland denied.

Same case below, 82 Md App 774.

No. 90-6987. Rudolph L. Kunz, Petitioner v Alaska

499 US 939, 113 L Ed 2d 451, 111 S Ct 1395.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 902 F2d 1578.

No. 90-6993. Pedro Rodriguez, Petitioner v Robert Hoke, Superintendent, Eastern Correctional Facility

499 US 939, 113 L Ed 2d 451, 111 S Ct 1395.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 844.

No. 90-6996. James Boyd, Petitioner v United States

499 US 939, 113 L Ed 2d 451, 111 S Ct 1396.

March 25, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 923 F2d 852.

No. 90-7002. Peter Van Der Jagt, Petitioner v SIB International Bancorp, Inc., et al.

499 US 939, 113 L Ed 2d 452, 111 S Ct 1396.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 914 F2d 252.

No. 90-7006. Varone Phillips, Petitioner v Daniel Senkowski, Superintendent, Clinton Correctional Facility

499 US 940, 113 L Ed 2d 452, 111 S Ct 1396.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 844.

No. 90-7009. Curtis Lee Allen, Petitioner v J. O. Davis, Warden

499 US 940, 113 L Ed 2d 452, 111 S Ct 1396.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 918 F2d 182.

No. 90-7012. James L. Martin, Petitioner v Joseph J. Farnan, et al.

499 US 940, 113 L Ed 2d 452, 111 S Ct 1396, reh den (US) 114 L Ed 2d 92, 111 S Ct 1699.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7017. Andrew Maurice Maryland, Petitioner v Larry W. Jarvis, et al.

499 US 940, 113 L Ed 2d 452, 111 S Ct 1396.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 1491.

No. 90-7022. Teresa Alejos-Perez and Miltino Inciarte, Petitioners v United States

499 US 940, 113 L Ed 2d 452, 111 S Ct 1397.

March 25, 1991. Petition for writ of certiorari to the United States

Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1302.

No. 90-7032. Richard Paul, Petitioner v United States

499 US 940, 113 L Ed 2d 453, 111 S Ct 1397.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 917 F2d 1306.

No. 90-7034. Oscar Roldan-Zapata, Petitioner v United States

499 US 940, 113 L Ed 2d 453, 111 S Ct 1397.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 916 F2d 795.

No. 90-7044. Adolph Delbridge and Jill Delbridge, Petitioners v New Jersey Division of Youth and Family Services

499 US 940, 113 L Ed 2d 453, 111 S Ct 1397, reh den (US) 115 L Ed 2d 1011, 111 S Ct 2843.

March 25, 1991. Petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division, denied.

No. 90-7045. Raymond Clinton Cohen, Petitioner v United States

499 US 940, 113 L Ed 2d 453, 111 S Ct 1397.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 958.

No. 90-7050. Alberto Valdez Ponce, Petitioner v United States

499 US 940, 113 L Ed 2d 453, 111 S Ct 1398.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 841.

No. 90-7055. David Francis Brom, Petitioner v Minnesota

499 US 940, 113 L Ed 2d 453, 111 S Ct 1398.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Minnesota denied.

Same case below, 463 NW2d 758.

No. 90-7064. Michael G. Doganiere, Petitioner v United States

499 US 940, 113 L Ed 2d 454, 111 S Ct 1398.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 165.

No. 90-7068. Joseph Samuel Smith, Petitioner v United States

499 US 940, 113 L Ed 2d 454, 111 S Ct 1398.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 1305.

No. 90-7079. Leonardo Ernie Ybabez, Petitioner v United States

499 US 940, 113 L Ed 2d 454, 111 S Ct 1398.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 919 F2d 508.

No. 90-7088. Robert Joseph Zani, Petitioner v George Waldron, et al.

499 US 940, 113 L Ed 2d 454, 111 S Ct 1398.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 917 F2d 562.

No. 90-7095. Martin Douglas Crago, Petitioner v Ohio

499 US 941, 113 L Ed 2d 454, 111 S Ct 1399.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Ohio denied.

Same case below, 53 Ohio St 3d 243, 559 NE2d 1353.

No. 90-7099. Jerome L. Johnson, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

499 US 941, 113 L Ed 2d 454, 111 S Ct 1399.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 918 F2d 175.

No. 90-7100. Anthony V. Mammolito, Petitioner v United States

499 US 941, 113 L Ed 2d 454, 111 S Ct 1399.

March 25, 1991. Petition for writ

of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 1576.

No. 90-7111. Martin Thomas Lawrence, Petitioner v United States

499 US 941, 113 L Ed 2d 455, 111 S Ct 1399.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 918 F2d 68.

No. 90-7119. Daniel Ray Watson, Petitioner v United States; and Jack T. Jackson, Petitioner v United States

499 US 941, 113 L Ed 2d 455, 111 S Ct 1399, reh den (US) 114 L Ed 2d 132, 111 S Ct 2049.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same cases below, 904 F2d 702 (first case) and 904 F2d 701 (second case).

No. 90-7129. Otto David Alvarado, Petitioner v United States

499 US 941, 113 L Ed 2d 455, 111 S Ct 1399.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1302.

No. 90-7130. Steve Richard Frondle, Petitioner v United States

499 US 941, 113 L Ed 2d 455, 111 S Ct 1400.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 918 F2d 62.

No. 90-7133. Josef John Casal, Petitioner v United States

499 US 941, 113 L Ed 2d 455, 111 S Ct 1400.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 1225.

No. 90-7138. Miguel Angil Gonzalez, Petition v United States

499 US 941, 113 L Ed 2d 455, 111 S Ct 1400.

March 25, 1991. Petition for writ of certiorari to the United States

Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 146.

No. 90-7142. Darrell Siggers, Petitioner v Pamela K. Withrow, Warden

499 US 941, 113 L Ed 2d 456, 111 S Ct 1400.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 141.

No. 90-7150. Peter Joshua Rosenberg, Petitioner v United States

499 US 941, 113 L Ed 2d 456, 111 S Ct 1400.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 918 F2d 181.

No. 90-7162. Catarino Landa-Vega, Petitioner v United States

499 US 941, 113 L Ed 2d 456, 111 S Ct 1400.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 920 F2d 930.

No. 90-7165. Patrick McCray, Petitioner v United States

499 US 941, 113 L Ed 2d 456, 111 S Ct 1401.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 1497.

No. 90-7166. Robert Steven Howell, Petitioner v United States

499 US 941, 113 L Ed 2d 456, 111 S Ct 1401.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 144.

No. 90-7168. Harvey Ernest Mathnay, Petitioner v United States

499 US 941, 113 L Ed 2d 456, 111 S Ct 1401.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 895 F2d 1418.

No. 90-7171. Jose Tamayo, Petitioner v United States

499 US 942, 113 L Ed 2d 457, 111 S Ct 1401.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 958.

No. 90-7175. Rita D. Koulizos, Petitioner v Commissioner of Internal Revenue

499 US 942, 113 L Ed 2d 457, 111 S Ct 1401.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 920 F2d 933.

No. 90-7176. Douglas Keith Lilly, Petitioner v United States

499 US 942, 113 L Ed 2d 457, 111 S Ct 1401.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 918 F2d 181.

No. 90-7178. Phillip L. Nolan, Petitioner v United States

499 US 942, 113 L Ed 2d 457, 111 S Ct 1402.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 910 F2d 1553.

No. 90-7181. John Edwards, Petitioner v United States

499 US 942, 113 L Ed 2d 457, 111 S Ct 1402.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 927 F2d 593.

No. 90-7182. David Reynolds, Petitioner v United States

499 US 942, 113 L Ed 2d 457, 111 S Ct 1402.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 919 F2d 435.

No. 90-7188. Fernando Alvarado-Gonzalez, Petitioner v United States

499 US 942, 113 L Ed 2d 457, 111 S Ct 1402.

March 25, 1991. Petition for writ of certiorari to the United States

Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 470.

No. 90-7191. Sharon Ann Burns, Petitioner v United States

499 US 942, 113 L Ed 2d 458, 111 S Ct 1402.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 732.

No. 90-7192. Reginald Whigham, Petitioner v Dale Foltz, Warden

499 US 942, 113 L Ed 2d 458, 111 S Ct 1402, reh den (US) 115 L Ed 2d 1012, 111 S Ct 2843.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-7207. David Charles McClinton, Petitioner v United States

499 US 942, 113 L Ed 2d 458, 111 S Ct 1403.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 925 F2d 1458.

No. 90-7208. Macario Garcia, Petitioner v United States

499 US 942, 113 L Ed 2d 458, 111 S Ct 1403.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 925 F2d 1471.

No. 90-7211. James Steven McClure, Petitioner v United States

499 US 942, 113 L Ed 2d 458, 111 S Ct 1403.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 918 F2d 956.

No. 90-7220. Charlie Wade Powell, Petitioner v United States

499 US 942, 113 L Ed 2d 458, 111 S Ct 1403.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 922 F2d 212.

No. 90-968. North Carolina, Petitioner v Leroy McNeil

499 US 942, 113 L Ed 2d 459, 111 S Ct 1403.

March 25, 1991. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the Supreme Court of North Carolina denied.

Same case below, 327 NC 388, 395 SE2d 106.

No. 90-1130. Walter R. Kelly, Superintendent, Attica Correctional Facility, Petitioner v Elmer Harper, Jr.

499 US 943, 113 L Ed 2d 459, 111 S Ct 1403.

March 25, 1991. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 916 F2d 54.

No. 90-1146. FMC, Petitioner v Shoshone-Bannock Tribes, et al.

499 US 943, 113 L Ed 2d 459, 111 S Ct 1404.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Justice White would grant certiorari.

Same case below, 905 F2d 1311.

No. 90-1212. Tahoe-Sierra Preservation Council, Inc., et al., Petitioners v Tahoe Regional Planning Agency, et al.

499 US 943, 113 L Ed 2d 459, 111 S Ct 1404.

March 25, 1991. The motion of Pacific Legal Foundation for leave to file a brief as amicus curiae is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 911 F2d 1331.

No. 90-1333. Gail Elizabeth Bobal, Petitioner v Rensselaer Polytechnic Institute, et al.

499 US 943, 113 L Ed 2d 459, 111 S Ct 1404.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Justice Blackmun took no part in the consideration or decision of this petition.

Same case below, 916 F2d 759.

No. 90-6193. Leonard James McSherry, Petitioner v Sherman Block, et al.

499 US 943, 113 L Ed 2d 459, 111 S Ct 1404.

March 25, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Justice White and Justice Marshall would grant certiorari.

Same case below, 880 F2d 1049.

No. 90-6951. Robert Charles Comer, Petitioner v Arizona

499 US 943, 113 L Ed 2d 460, 111 S Ct 1404.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Same case below, 165 Ariz 413, 799 P2d 333.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7193. Gary Lee Howard, Sr., Petitioner v James Rowland, et al.

499 US 943, 113 L Ed 2d 460, 111 S Ct 1405.

March 25, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7228. In Re John Ross, Petitioner

499 US 935, 113 L Ed 2d 460, 111 S Ct 1405.

March 25, 1991. The petition for writ of habeas corpus is denied.

No. 90-1152. In Re J. A. (Jack) Stubblefield, Petitioner

499 US 935, 113 L Ed 2d 460, 111 S Ct 1405.

March 25, 1991. The petition for writ of mandamus is denied.

90-7094. In Re Raymond Jackson, Petitioner

499 US 935, 113 L Ed 2d 460, 111 S Ct 1405.

March 25, 1991. The petition for writ of mandamus is denied.

No. 90-6974. In Re George Sassower, Petitioner

499 US 935, 113 L Ed 2d 460, 111 S Ct 1405.

March 25, 1991. The petition for

writ of mandamus and/or prohibition is denied.

No. 90-7000. In Re George Sassower, Petitioner

499 US 935, 113 L Ed 2d 461, 111 S Ct 1405.

March 25, 1991. The petition for writ of mandamus and/or prohibition is denied.

No. 90-835. Harriet Smith, Administratrix of the Estate of Willette Leonard Smith, Deceased, Petitioner v City of Berkeley, et al.

499 US 943, 113 L Ed 2d 461, 111 S Ct 1406.

March 25, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1068, 112 L Ed 2d 848, 111 S Ct 785.

No. 90-1054. In Re Jessie D. McDonald, Petitioner

499 US 943, 113 L Ed 2d 461, 111 S Ct 1406.

March 25, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1081, 112 L Ed 2d 1108, 111 S Ct 1027.

No. 90-5783. Stanley Joseph Callis, Petitioner v Edward W. Murray, Director, Virginia Department of Corrections, et al.

499 US 943, 113 L Ed 2d 461, 111 S Ct 1406.

March 25, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1091, 112 L Ed 2d 1059, 111 S Ct 974.

No. 90-6411. Michael Sindram, Petitioner v J. James McKenna, et al.

499 US 943, 113 L Ed 2d 461, 111 S Ct 1406.

March 25, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1096, 112 L Ed 2d 1070, 111 S Ct 985.

No. 88-1938. Sandy Townsley, Petitioner v United States

499 US 944, 113 L Ed 2d 461, 111 S Ct 1406.

March 28, 1991. The petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in the above-entitled case was dismissed today pursuant to Rule 46 of this court.

Same case below, 856 F2d 1189.

No. 90-404. Illinois State Labor Relations Board, et al., Petitioners v Illinois Nurses Association, et al.

499 US 944, 113 L Ed 2d 462, 111 S Ct 1406.

April 1, 1991. On petition for writ of certiorari to the Appellate Court of Illinois, First District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Court of Illinois, First District, for further consideration in light of the advisory opinion of the National Labor Relations Board in Correctional Medical Systems, Inc., 299 NLRB 654 (1990). Justice White and Justice Blackmun would grant certiorari and set the case for oral argument.

Same case below, 196 Ill App 3d 576, 554 NE2d 404.

No. 90-731. Haines and Company, Inc., et al., Petitioners v Illinois Bell Telephone Company

499 US 944, 113 L Ed 2d 462, 111 S Ct 1408.

April 1, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of Feist Publications, Inc. v Rural Telephone Service Company, Inc. 499 US 340, 113 L Ed 2d 358, 111 S Ct 1282 (1991).

Same case below, 905 F2d 1081.

No. 90-1251. Pennsylvania, Petitioner v Carl Franz Ogborne

499 US 944, 113 L Ed 2d 462, 111 S Ct 1408.

April 1, 1991. On petition for writ of certiorari to the Superior Court of Pennsylvania, Philadelphia Office. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Superior Court of Pennsylvania, Philadelphia Office, for further consideration in light of Alabama v White, 496 US 325, 110 L Ed 2d 301, 110 S Ct 2412 (1990).

Same case below, 384 Pa Super 604, 559 A2d 931.

No. 90-6766. James S. Blackmer, Petitioner v United States

499 US 944, 113 L Ed 2d 462, 111 S Ct 1409.

April 1, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Gozlon-Peretz v United States, 498 US 395, 112 L Ed 2d 919, 111 S Ct 840 (1991).

Same case below, 909 F2d 66.

No. ——. Waadew Aysisayh, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

499 US 944, 113 L Ed 2d 462, 111 S Ct 1409.

April 1, 1991. The motion to direct

the Clerk to file a petition for a writ of certiorari, out of time, is denied.

No. ——. Public Administrator of the County of New York, as Administrator of the Estate of Andrew J. Milam, Petitioner v Gibson & Cushman of New York, Inc.

499 US 944, 113 L Ed 2d 463, 111 S Ct 1409.

April 1, 1991. The motion for leave to proceed in forma pauperis without an affidavit of indigency executed by the petitioner is granted.

No. A-707. Ann Richards, Governor of Texas, et al., Applicants v United States District Court for the Southern District of Texas (Sheriff of Harris County, et al., Real Parties in Interest)

499 US 945, 113 L Ed 2d 463, 111 S Ct 1409.

April 1, 1991. The application for stay of a portion of the judgment of the United States District Court for the Southern District of Texas filed February 7, 1991, presented to Justice Scalia, and by him referred to the Court, is denied. The order heretofore entered by Justice Scalia on March 20, 1991, is vacated.

No. A-712. City of Yonkers, Applicant v United States, et al.

499 US 945, 113 L Ed 2d 463, 111 S Ct 1410.

April 1, 1991. The application for stay, addressed to The Chief Justice and referred to the Court, is denied.

No. A-716. Roy Williams, et al., Applicants v City of Dallas

499 US 945, 113 L Ed 2d 463, 111 S Ct 1410.

April 1, 1991. The application to vacate a stay order entered by the United States Court of Appeals for the Fifth Circuit, presented to Justice Scalia, and by him referred to the Court, is denied.

No. D-947. In the Matter of Disbarment of Howard A. Pattison

499 US 945, 113 L Ed 2d 463, 111 S Ct 1410.

April 1, 1991. Disbarment order entered.

No. D-962. In the Matter of Disbarment of Leonard Rubin

499 US 945, 113 L Ed 2d 463, 111 S Ct 1410.

April 1, 1991. Disbarment order entered.

No. D-967. In the Matter of Disbarment of Robert W. Costigan

499 US 945, 113 L Ed 2d 464, 111 S Ct 1410.

April 1, 1991. Disbarment order entered.

No. D-988. In the Matter of Disbarment of Loretta B. Anderson

499 US 945, 113 L Ed 2d 464, 111 S Ct 1410.

April 1, 1991. It is ordered that Loretta B. Anderson, of Tampa, Florida, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D-989. In the Matter of Disbarment of William C. Mach

499 US 945, 113 L Ed 2d 464, 111 S Ct 1411.

April 1, 1991. It is ordered that William C. Mach, of Tucson, Arizona, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-990. In the Matter of Disbarment of John Ross Miller

499 US 945, 113 L Ed 2d 464, 111 S Ct 1411.

April 1, 1991. It is ordered that John Ross Miller, of Salem, Oregon, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 118, Original. United States, Plaintiff v State of Alaska

499 US 946, 113 L Ed 2d 464, 111 S Ct 1411.

April 1, 1991. The motion for leave to file a bill of complaint is granted. The defendant is allowed sixty days within which to file an answer.

No. 89-1895. Astoria Federal Savings and Loan Association, Petitioner v Angelo J. Solimino

499 US 946, 113 L Ed 2d 464, 111 S Ct 1411.

April 1, 1991. The motion of the Solicitor General to permit Amy L. Wax, Esquire, to present oral argument pro hac vice is granted.

No. 90-769. Louise H. Renne, San Francisco City Attorney, et al., Petitioners v Bob Geary, et al.

499 US 946, 113 L Ed 2d 464, 111 S Ct 1411.

April 1, 1991. The motion of California Democratic Party, et al. for

leave to participate in oral argument as amici curiae and for divided argument is granted.

No. 90-1270. Alabama, Petitioner v Raymond Eugene Brown

499 US 946, 113 L Ed 2d 465, 111 S Ct 1411.

April 1, 1991. The motion of respondent for leave to proceed in forma pauperis is granted.

No. 90-1090. Immigration and Naturalization Service, et al., Petitioners v National Center for Immigrants' Rights, Inc., et al.

499 US 946, 113 L Ed 2d 465, 111 S Ct 1412.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Question 2 presented by the petition.

Same case below, 913 F2d 1350.

No. 90-1262. Arkansas, et al., Petitioners v Oklahoma, et al.

No. 90-1266. Environmental Protection Agency, Petitioner v Oklahoma, et al.

499 US 946, 113 L Ed 2d 465, 111 S Ct 1412.

April 1, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Tenth Circuit granted. The cases are consolidated and a total of one hour is allotted for oral argument.

Same cases below, 908 F2d 595.

No. 90-5844. Terry Foucha, Petitioner v Louisiana

499 US 946, 113 L Ed 2d 465, 111 S Ct 1412.

April 1, 1991. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the Supreme Court of Louisiana granted.

Same case below, 563 So 2d 1138.

No. 90-6704. David Dawson, Petitioner v Delaware

499 US 946, 113 L Ed 2d 465, 111 S Ct 1412.

April 1, 1991. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the Supreme Court of Delaware granted.

Same case below, 581 A2d 1078.

No. 90-321. Frederick R. Clark, et al., Petitioners v United States

499 US 946, 113 L Ed 2d 465, 111 S Ct 1412.

April 1, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Ninth Circuit denied.

Same case below, 898 F2d 156.

No. 90-719. Steven Iannacone, Petitioner v New Jersey

499 US 947, 113 L Ed 2d 466, 111 S Ct 1413.

April 1, 1991. Petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division, denied.

No. 90-733. Donald Hamm, Petitioner v New Jersey

499 US 947, 113 L Ed 2d 466, 111 S Ct 1413.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of New Jersey denied.

Same case below, 121 NJ 109, 577 A2d 1259.

No. 90-893. New Mexico, Petitioner v John B. Work

499 US 947, 113 L Ed 2d 466, 111 S Ct 1413.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of New Mexico denied.

Same case below, 111 NM 145, 803 P2d 234.

No. 90-1058. Michael A. Hartman and Benjamin H. Woods, Petitioners v United States

499 US 947, 113 L Ed 2d 466, 111 S Ct 1413.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 915 F2d 854.

No. 90-1072. Alfred E. Ramey, Petitioner v United States General Accounting Office, et al.

499 US 947, 113 L Ed 2d 466, 111 S Ct 1413.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 286 US App DC 288, 915 F2d 731.

No. 90-1081. Raymond Cutter and Anna Sizemore, Petitioners v United States

499 US 947, 113 L Ed 2d 466, 111 S Ct 1413.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 775.

No. 90-1087. Kendrix M. Easley, Petitioner v University of Michigan Board of Regents, et al.

499 US 947, 113 L Ed 2d 467, 111 S Ct 1414.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 906 F2d 1143.

No. 90-1093. Leah Liza Marks, Petitioner v United States

499 US 947, 113 L Ed 2d 467, 111 S Ct 1414.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 910 F2d 343.

No. 90-1108. Kaiser Development Company, aka KACOR Development Company, et al., Petitioners v City and County of Honolulu

499 US 947, 113 L Ed 2d 467, 111 S Ct 1414.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 898 F2d 112 and 913 F2d 573.

No. 90-1129. Sumitomo Trust & Banking Co. (U.S.A.), Petitioner v Eden Hannon & Company

499 US 947, 113 L Ed 2d 467, 111 S Ct 1414.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 556.

No. 90-1179. State Farm General Insurance Company, et al., Petitioners v Muriel E. Kraszewski, et al.

499 US 947, 113 L Ed 2d 467, 111 S Ct 1414.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 1182.

No. 90-1196. Shirley Simnick, Petitioner v United States

499 US 947, 113 L Ed 2d 467, 111 S Ct 1415.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

No. 90-1243. Humphreys (Cayman) Limited, Petitioner v Dorothy A. Wilson, et vir

499 US 947, 113 L Ed 2d 468, 111 S Ct 1415.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 916 F2d 1239.

No. 90-1249. R. R. Donnelley & Sons Company, Petitioner v Judy Prevost, et al.

499 US 947, 113 L Ed 2d 468, 111 S Ct 1415.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 915 F2d 787.

No. 90-1250. Burlington Northern Railroad Company and R. H. Shalhoop, Petitioners v Joan Faye Whitt, Administratrix of the Estate of William Charles Whitt, Deceased

499 US 948, 113 L Ed 2d 468, 111 S Ct 1415.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of Alabama denied.

Same case below, 575 So 2d 1011.

No. 90-1253. Susan J. Fasse and Elizabeth Fasse, Petitioners v Patricia Hodgson

499 US 948, 113 L Ed 2d 468, 111 S Ct 1415, reh den (US) 114 L Ed 2d 472, 111 S Ct 2068.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of Georgia denied.

Same case below, 397 SE2d 710.

No. 90-1257. Ivan C. Cleveland, Petitioner v Washington

499 US 948, 113 L Ed 2d 468, 111 S Ct 1415.

April 1, 1991. Petition for writ of certiorari to the Court of Appeals of Washington, Division 1, denied.

Same case below, 58 Wash App 634, 794 P2d 546.

No. 90-1259. Lawrence C. Redmond, Jr., Petitioner v Illinois

499 US 948, 113 L Ed 2d 468, 111 S Ct 1416.

April 1, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Fourth District, denied.

Same case below, 196 Ill App 3d 1109, 582 NE2d 776.

No. 90-1263. Robert Donald Yasko, Petitioner v Washington

499 US 948, 113 L Ed 2d 468, 111 S Ct 1416.

April 1, 1991. Petition for writ of certiorari to the Court of Appeals of Washington, Division 2, denied.

Same case below, 55 Wash App 1044.

No. 90-1267. General Motors Corporation, Petitioner v Norman Duerr

499 US 948, 113 L Ed 2d 469, 111 S Ct 1416.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 911 F2d 732.

No. 90-1268. Richard V. Secord, Petitioner v Virginia

499 US 948, 113 L Ed 2d 469, 111 S Ct 1416.

April 1, 1991. Petition for writ of certiorari to the Court of Appeals of Virginia denied.

No. 90-1274. Sheldon I. Wieland, Jr., Petitioner v Robert Brown, Director, Michigan Department of Corrections

499 US 948, 113 L Ed 2d 469, 111 S Ct 1416.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 1305.

No. 90-1275. Joseph Pierre Rene Scovel, Petitioner v Norfolk Shipbuilding & Drydock Company, Inc.

499 US 948, 113 L Ed 2d 469, 111 S Ct 1416.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of Virginia denied.

Same case below, 240 Va 472, 397 SE2d 884.

No. 90-1296. Remington Arms Company, Inc., Petitioner v Nicholas N. King

499 US 948, 113 L Ed 2d 469, 111 S Ct 1417.

April 1, 1991. Petition for writ of certiorari to the Court of Appeals of Kentucky denied.

No. 90-1300. Dean Witter Reynolds Inc., et al., Petitioners v Linda Strotz

499 US 948, 113 L Ed 2d 469, 111 S Ct 1417.

April 1, 1991. Petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District, denied.

Same case below, 223 Cal App 3d 208, 272 Cal Rptr 680.

No. 90-1307. Francis A. Tomcsik, Jr., Petitioner v United States

499 US 948, 113 L Ed 2d 470, 111 S Ct 1417.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 564.

No. 90-1308. Berman J. Watts, Jr., Petitioner v Michael P. W. Stone, Secretary of the Army

499 US 948, 113 L Ed 2d 470, 111 S Ct 1417.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 908 F2d 979.

No. 90-1323. B. K. Agnihotri, et al., Petitioners v Kenneth J. Arenson

499 US 949, 113 L Ed 2d 470, 111 S Ct 1417.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 911 F2d 1124.

No. 90-1345. Willie J. Williams, Petitioner v United States

499 US 949, 113 L Ed 2d 470, 111 S Ct 1417.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 179.

No. 90-1346. Gennie Daryl King, Petitioner v United States

499 US 949, 113 L Ed 2d 470, 111 S Ct 1418.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 914 F2d 269.

No. 90-1347. Winston C. Baber, Petitioner v United States

499 US 949, 113 L Ed 2d 470, 111 S Ct 1418.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 918 F2d 176.

No. 90-1349. Sonny B. Webb, Petitioner v William K. Reilly, Administrator, Environmental Protection Agency

499 US 949, 113 L Ed 2d 470, 111 S Ct 1418.

April 1, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 1493.

No. 90-1350. Josef Ben-Porat, et al., Petitioners v Commissioner of Internal Revenue

499 US 949, 113 L Ed 2d 471, 111 S Ct 1418, reh den (US) 114 L Ed 2d 472, 111 S Ct 2068.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 908 F2d 976.

No. 90-1363. Laborers' Local 332, Petitioner v National Labor Relations Board

499 US 949, 113 L Ed 2d 471, 111 S Ct 1418.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 732.

No. 90-1364. Louis Anthony Manna, Petitioner v United States

499 US 949, 113 L Ed 2d 471, 111 S Ct 1418.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 733.

No. 90-1375. Joseph Kasparoff, Petitioner v United States

499 US 949, 113 L Ed 2d 471, 111 S Ct 1419.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 146.

No. 90-5204. Ruben Campaneria, Petitioner v Theodore Reid, Superintendent, Fishkill Correctional Facility, et al.

499 US 949, 113 L Ed 2d 471, 111 S Ct 1419.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 891 F2d 1014.

No. 90-6303. Vladimir Zatko, Petitioner v United States District Court for the Northern District of California

499 US 949, 113 L Ed 2d 471, 111 S Ct 1419.

April 1, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6409. Vladimir Zatko, Petitioner v United States District Court for the Central District of California

499 US 949, 113 L Ed 2d 472, 111 S Ct 1419.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6432. Vladimir Zatko, Petitioner v United States District Court for the Northern District of California

499 US 949, 113 L Ed 2d 472, 111 S Ct 1419.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6433. Vladimir Zatko, Petitioner v United States District Court for the Eastern District of California

499 US 950, 113 L Ed 2d 472, 111 S Ct 1420.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6456. Robert Lee Washington, Petitioner v William F. Rucker

499 US 950, 113 L Ed 2d 472, 111 S Ct 1420.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-6505. Joseph Silverburg, Petitioner v Carol Stewart, et al.

499 US 950, 113 L Ed 2d 472, 111 S Ct 1420.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 179.

No. 90-6581. Vladimir Zatko, Petitioner v California

499 US 950, 113 L Ed 2d 472, 111 S Ct 1420.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-6582. Vladimir Zatko, Petitioner v United States District Court for the Northern District of California

499 US 950, 113 L Ed 2d 472.

April 1, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6583. Vladimir Zatko, Petitioner v California

499 US 950, 113 L Ed 2d 473, 111 S Ct 1420.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-6613. Danny B. Stott, Petitioner v Paul Caspari, Superintendent, Missouri Eastern Correctional Center

499 US 950, 113 L Ed 2d 473, 111 S Ct 1421.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 1578.

No. 90-6664. Arnaldo De Dios Valdes, Petitioner v United States

499 US 950, 113 L Ed 2d 473, 111 S Ct 1421.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 138.

No. 90-6698. Vladimir Zatko, Petitioner v United States District Court for the Northern District of California

499 US 950, 113 L Ed 2d 473, 111 S Ct 1421.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6719. Mariano H. Ospina, Petitioner v United States

499 US 950, 113 L Ed 2d 473, 111 S Ct 1421.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 911 F2d 741.

No. 90-6727. Anthony Chotas, Petitioner v United States

499 US 950, 113 L Ed 2d 473, 111 S Ct 1421.

April 1, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 913 F2d 897.

No. 90-6759. John J. Maguire, Petitioner v United States

499 US 950, 113 L Ed 2d 474, 111 S Ct 1421, reh den (US) 114 L Ed 2d 472, 111 S Ct 2068.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 918 F2d 254.

No. 90-6761. Marc Griffith, Petitioner v United States

499 US 950, 113 L Ed 2d 474, 111 S Ct 1422.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 1305.

No. 90-6790. Vladimir Zatko, Petitioner v Superior Court of California, Del Norte County

499 US 950, 113 L Ed 2d 474, 111 S Ct 1422.

April 1, 1991. Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

No. 90-6796. Randall Wendt, Petitioner v Wisconsin

499 US 951, 113 L Ed 2d 474, 111 S Ct 1422.

April 1, 1991. Petition for writ of certiorari to the Court of Appeals of Wisconsin, District III, denied.

Same case below, 157 Wis 2d 815, 461 NW2d 449.

No. 90-6878. Vladimir Zatko, Petitioner v California

499 US 951, 113 L Ed 2d 474, 111 S Ct 1422.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-6917. James Panda, Petitioner v National Labor Relations Board

499 US 951, 113 L Ed 2d 474, 111 S Ct 1422.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-6969. Glenn H. Gridley, Petitioner v United States

499 US 951, 113 L Ed 2d 475, 111 S Ct 1422.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 909 F2d 1486.

No. 90-6978. Cesar A. Coria, Petitioner v Office of Personnel Management

499 US 951, 113 L Ed 2d 475, 111 S Ct 1423.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 907 F2d 158.

No. 90-6997. Jay C. Allen, Petitioner v United States Postal Service

499 US 951, 113 L Ed 2d 475, 111 S Ct 1423, reh den (US) 114 L Ed 2d 473, 111 S Ct 2069.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 918 F2d 187.

No. 90-6999. Lawrence Simmons, Petitioner v New Jersey

499 US 951, 113 L Ed 2d 475, 111 S Ct 1423.

April 1, 1991. Petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division, denied.

No. 90-7019. Allison R. Childs, Petitioner v Robert Liskey

499 US 951, 113 L Ed 2d 475, 111 S Ct 1423, reh den (US) 114 L Ed 2d 473, 111 S Ct 2069.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-7024. Estasio Orso, Petitioner v Missouri

499 US 951, 113 L Ed 2d 475, 111 S Ct 1423, reh den (US) 115 L Ed 2d 1010, 111 S Ct 2841.

April 1, 1991. Petition for writ of certiorari to the Court of Appeals of Missouri, Eastern District, denied.

Same case below, 789 SW2d 177.

No. 90-7025. John D. Keller, Petitioner v George E. Petsock, Warden, et al.

499 US 951, 113 L Ed 2d 475, 111 S Ct 1423.

April 1, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Third Circuit denied.

No. 90-7027. James L. Martin, Petitioner v Daniel H. Huyett

499 US 951, 113 L Ed 2d 476, 111 S Ct 1424, reh den (US) 114 L Ed 2d 132, 111 S Ct 2049.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7031. Estelle Fisher, Petitioner v Chicago Transit Authority, et al.

499 US 951, 113 L Ed 2d 476, 111 S Ct 1424, reh den (US) 114 L Ed 2d 473, 111 S Ct 2069.

April 1, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

No. 90-7033. Daries Sherrills, Petitioner v David Goldberger, et al.

499 US 951, 113 L Ed 2d 476, 111 S Ct 1424.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-7038. Alfred Keith Bragg, Petitioner v Columbus City Police, et al.

499 US 951, 113 L Ed 2d 476, 111 S Ct 1424.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 912 F2d 465.

No. 90-7039. Nancy Jewell Cross, Petitioner v San Mateo County Transit District

499 US 951, 113 L Ed 2d 476, 111 S Ct 1424.

April 1, 1991. Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

No. 90-7056. Dorothy E. Scott, Petitioner v Buehler Food Markets, Inc.

499 US 952, 113 L Ed 2d 476, 111 S Ct 1424, reh den (US) 114 L Ed 2d 492, 111 S Ct 2251.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 141.

No. 90-7058. Roosevelt C. Bentley, Petitioner v New York, et al. (two cases)

499 US 952, 113 L Ed 2d 476, 111 S Ct 1425.

April 1, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 90-7062. James E. Christian, Petitioner v Pacific Gas and Electric Company

499 US 952, 113 L Ed 2d 477, 111 S Ct 1425, reh den (US) 114 L Ed 2d 473, 111 S Ct 2069.

April 1, 1991. Petition for writ of certiorari to the Court of Appeal of California, First Appellate District, denied.

No. 90-7063. Frank Barela, Petitioner v Arizona

499 US 952, 113 L Ed 2d 477, 111 S Ct 1425.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 27.

No. 90-7075. Eddie B. Neal, Petitioner v Larry Burton, Warden, et al.

499 US 952, 113 L Ed 2d 477, 111 S Ct 1425.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-7077. Cecil Browne, Petitioner v James A. Robb

499 US 952, 113 L Ed 2d 477, 111 S Ct 1425.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of Delaware denied.

Same case below, 583 A2d 949.

No. 90-7081. Willie Grant, Petitioner v Charles H. Zimmerman, et al.

499 US 952, 113 L Ed 2d 477, 111 S Ct 1425.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7082. Reginald Lights, Petitioner v Walter R. Kelly, Superintendent, Attica Correctional Facility

499 US 952, 113 L Ed 2d 477, 111 S Ct 1426.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 844.

No. 90-7083. James L. Martin, Petitioner v Clarkson S. Fisher, et al.

499 US 952, 113 L Ed 2d 478, 111 S Ct 1426, reh den (US) 114 L Ed 2d 473, 111 S Ct 2069.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7085. Freddie Cummings, Petitioner v James D. Purkett, Superintendent, Farmington Correction Center

499 US 952, 113 L Ed 2d 478, 111 S Ct 1426.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

No. 90-7110. Lewis McDaniel, Petitioner v Arizona, et al.

499 US 952, 113 L Ed 2d 478, 111 S Ct 1426.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 921 F2d 280 and 921 F2d 966.

No. 90-7115. Fannie J. Gilliam, Petitioner v United States

499 US 952, 113 L Ed 2d 478, 111 S Ct 1426.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 137.

No. 90-7123. Jerry Virgil Cammack, Petitioner v United States

499 US 952, 113 L Ed 2d 478, 111 S Ct 1426.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 919 F2d 737.

No. 90-7126. William Green Biggs, Jr., Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

499 US 952, 113 L Ed 2d 478, 111 S Ct 1427.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 90-7148. Raymond Graves, Petitioner v Arthur Tate, Jr., Warden

499 US 953, 113 L Ed 2d 478, 111 S Ct 1427.

April 1, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 957.

No. 90-7149. Paul Richard Russell, Petitioner v United States

499 US 953, 113 L Ed 2d 479, 111 S Ct 1427.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 917 F2d 512.

No. 90-7157. Martin Anthony Casella, Petitioner v United States

499 US 953, 113 L Ed 2d 479, 111 S Ct 1427.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 733.

No. 90-7161. Leroy Rudy Jeffers, Petitioner v Richard H. Clark, Superintendent, Indiana State Prison, et al.

499 US 953, 113 L Ed 2d 479, 111 S Ct 1427.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

No. 90-7172. Delio F. Cataulin, Petitioner v Office of Personnel Management

499 US 953, 113 L Ed 2d 479, 111 S Ct 1427.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 915 F2d 1584.

No. 90-7180. Rocco J. Napoli, Petitioner v United States

499 US 953, 113 L Ed 2d 479, 111 S Ct 1428.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 733.

No. 90-7189. David L. Henry, Petitioner v United States Department of the Interior

499 US 953, 113 L Ed 2d 479, 111 S Ct 1428, reh den (US) 114 L Ed 2d 133, 111 S Ct 2049.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 923 F2d 869.

No. 90-7215. Carl Leibowitz, Petitioner v United States

499 US 953, 113 L Ed 2d 480, 111 S Ct 1428, reh den (US) 114 L Ed 2d 133, 111 S Ct 2049.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 919 F2d 482.

No. 90-7222. Donnell Jasper Jordan, Petitioner v United States

499 US 953, 113 L Ed 2d 480, 111 S Ct 1428.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 287 US App DC 245, 920 F2d 1039.

No. 90-7224. Darryl Lee Williams, Petitioner v United States

499 US 953, 113 L Ed 2d 480, 111 S Ct 1428.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 920 F2d 1377.

No. 90-7235. Tommy Birch, Petitioner v United States

499 US 953, 113 L Ed 2d 480, 111 S Ct 1428.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 925 F2d 1473.

No. 90-7236. Elias Delgado-Serrano, Petitioner v United States

499 US 953, 113 L Ed 2d 480, 111 S Ct 1428.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 914 F2d 252.

No. 90-7237. Steve J. Layton, Petitioner v South Dakota, et al.

499 US 953, 113 L Ed 2d 480, 111 S Ct 1429.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 918 F2d 739.

No. 90-7238. Donald X. Kidd, Petitioner v David Williams, Warden, et al.

499 US 953, 113 L Ed 2d 480, 111 S Ct 1429.

April 1, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Fourth Circuit denied.

Same case below, 922 F2d 836.

No. 90-7239. James Ronald Lowe, Petitioner v United States

499 US 953, 113 L Ed 2d 481, 111 S Ct 1429.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 918 F2d 181.

No. 90-7240. Julio DeParias, Petitioner v United States

499 US 954, 113 L Ed 2d 481, 111 S Ct 1429.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 917 F2d 568.

No. 90-7241. Curtis Ballard, Petitioner v United States

499 US 954, 113 L Ed 2d 481, 111 S Ct 1429.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 919 F2d 255.

No. 90-7242. Edwin Vanderlaan, Petitioner v United States

499 US 954, 113 L Ed 2d 481, 111 S Ct 1429.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 921 F2d 257.

No. 90-7244. Danny Michael Weeks, Petitioner v United States

499 US 954, 113 L Ed 2d 481, 111 S Ct 1430.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 919 F2d 248.

No. 90-7247. Lonnie Williams, Petitioner v United States

499 US 954, 113 L Ed 2d 481, 111 S Ct 1430.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 147.

No. 90-7291. James Charleston, Petitioner v Louis Mann, Superintendent, Shawangunk Correctional Facility

499 US 954, 113 L Ed 2d 482, 111 S Ct 1430.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 89-6482. Richard Wade Cooey, II, Petitioner v Ohio

499 US 954, 113 L Ed 2d 482, 111 S Ct 1431, reh den (US) 114 L Ed 2d 472, 111 S Ct 2068.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of Ohio denied.

Same case below, 46 Ohio St 3d 20, 544 NE2d 895.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-5414. Tracy Lee, Petitioner v Louisiana

499 US 954, 113 L Ed 2d 482, 111 S Ct 1431, reh den (US) 114 L Ed 2d 472, 111 S Ct 2068.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of Louisiana denied.

Same case below, 559 So 2d 1310.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6444. Leslie Beasley, Petitioner v Pennsylvania

499 US 954, 113 L Ed 2d 482, 111 S Ct 1431.

April 1, 1991. Petition for writ of certiorari to the Superior Court of Pennsylvania, Philadelphia Office, denied.

Same case below, 395 Pa Super 649, 570 A2d 585.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-6913. Marvin C. Jones, Petitioner v Paul Delo, Superintendent, Potosi Correctional Center

499 US 954, 113 L Ed 2d 483, 111 S Ct 1432.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 923 F2d 860.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7016. Jose Martinez High, Petitioner v Walter Zant, Warden

499 US 954, 113 L Ed 2d 483, 111 S Ct 1432, reh den (US) 114 L Ed 2d 473, 111 S Ct 2069.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 916 F2d 1507.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7134. Douglas Ray Stankewitz, Petitioner v California

499 US 954, 113 L Ed 2d 483, 111 S Ct 1432, reh den (US) 116 L Ed 2d 651, 112 S Ct 631.

April 1, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

Same case below, 51 Cal 3d 72, 793 P2d 23.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7199. Robert Madden, Petitioner v Texas

499 US 954, 113 L Ed 2d 483, 111 S Ct 1432.

April 1, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 799 SW2d 683.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d

859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-1078. Richard Lyman, Jr., et al., Petitioners v City and County of Honolulu

499 US 954, 113 L Ed 2d 484, 111 S Ct 1430.

April 1, 1991. The motion of Pacific Legal Foundation for leave to file a brief as amicus curiae is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 898 F2d 112 and 913 F2d 573.

No. 90-1242. Brignoli & Curley, Inc., et al., Petitioners v John J. Curley, et al.

499 US 955, 113 L Ed 2d 484, 111 S Ct 1430.

April 1, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Justice White would grant certiorari.

Same case below, 915 F2d 81.

No. 90-1269. Function Junction, Inc., et al., Petitioners v Paul Crowe, et al.

499 US 955, 113 L Ed 2d 484, 111 S Ct 1431.

April 1, 1991. The motion of respondents for damages pursuant to this Court's Rule 42.2 is denied. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 911 F2d 579.

No. 90-5806. Alvin Parker, Petitioner v Michael D. Parsons, Warden, et al.

499 US 955, 113 L Ed 2d 484, 111 S Ct 1433.

April 1, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1121, 112 L Ed 2d 1182, 111 S Ct 1077.

No. 90-6229. James L. Martin, Petitioner v Supreme Court of Delaware

499 US 955, 113 L Ed 2d 484, 111 S Ct 1433.

April 1, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1094, 112 L Ed 2d 1066, 111 S Ct 981.

No. 90-6301. Robert Shaw, Petitioner v Howard Peters, Warden

499 US 955, 113 L Ed 2d 485, 111 S Ct 1433.

April 1, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1071, 112 L Ed 2d 855, 111 S Ct 793.

No. 90-6420. Donald E. Hunziker and Joan E. Hunziker, Petitioners v German-American State Bank, et al.

499 US 955, 113 L Ed 2d 485, 111 S Ct 1433.

April 1, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1073, 112 L Ed 2d 859, 111 S Ct 798.

No. 90-6421. In Re Donald E. Hunziker and Joan E. Hunziker, Petitioners

499 US 955, 113 L Ed 2d 485, 111 S Ct 1433.

April 1, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1065, 112 L Ed 2d 862, 111 S Ct 801.

No. 90-6478. Kevin Cruickshank, Petitioner v American Honda

499 US 955, 113 L Ed 2d 485, 111 S Ct 1433.

April 1, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1097, 112 L Ed 2d 1073, 111 S Ct 989.

No. 90-815. Joseph A. Blaine, Petitioner v Martin Marmor, et ux.

499 US 955, 113 L Ed 2d 485, 111 S Ct 1434.

April 1, 1991. The motion of petitioner for leave to proceed further herein in forma pauperis is granted. The petition for rehearing is denied.

Former Decision, 498 US 1067, 112 L Ed 2d 847, 111 S Ct 784.

No. 90-1052. Genentech, Inc., et al., Petitioners v Hormone Research Foundation, et al.

499 US 955, 113 L Ed 2d 485, 111 S Ct 1434.

April 3, 1991. The petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit in the above-entitled case was dismissed today pursuant to Rule 46 of this court.

Same case below, 904 F2d 1558.

[499 US 432]

RICHARD B. KAY, Petitioner

v

BREMER EHRLER and KENTUCKY BOARD OF ELECTIONS

499 US 432, 113 L Ed 2d 486, 111 S Ct 1435

[No. 90-79]

Argued February 25, 1991. Decided April 16, 1991.

Decision: 42 USCS § 1988 held not to authorize award of attorney's fee to attorney representing himself in successful civil rights action.

SUMMARY

In 1980, an attorney licensed to practice law in Florida requested the Kentucky Board of Elections to place his name on the Democratic Party's primary election ballot for the office of President of the United States. His request was denied based on the board's conclusion that the attorney was not a candidate who was "generally advocated and nationally recognized" within the meaning of the controlling Kentucky statute. In the United States District Court for the Eastern District of Kentucky, the attorney successfully challenged the statute on constitutional grounds and won an injunction requiring his name to be placed on the ballot. The Kentucky General Assembly repealed the statute 2 years later, but enacted an identically worded statute in 1986. In 1987, the attorney again requested that his name appear on the primary ballot. When the board initially refused his request, the attorney again brought suit in the same District Court and prevailed as before; this time, however, he requested an attorney's fee award under 42 USCS § 1988, which authorizes awards of reasonable attorneys' fees to prevailing parties, other than the United States, in certain civil rights actions. The District Court denied the request. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed on the grounds that the language of § 1988 assumes a paying relationship between an attorney and a client (900 F2d 967).

On certiorari, the United States Supreme Court affirmed. In an opinion by STEVENS, J., expressing the unanimous view of the court, it was held that a pro se civil rights litigant who is also a lawyer may not be awarded attorney's fees under § 1988, because (1) it seems likely that Congress

Briefs of Counsel, p 801, infra.

contemplated an attorney-client relationship as the predicate for a fee award under § 1988; (2) the overriding concern of § 1988 is the interest in obtaining independent counsel for victims of civil rights violations in order to insure the effective prosecution of meritorious claims; (3) even a skilled lawyer who represents himself is at a disadvantage in contested litigation; (4) a rule that authorizes awards of counsel fees to pro se litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf; and (5) the statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights § 79; Statutes §§ 82, 102, 103 — award of attorney's fee — pro se litigant who is attorney

1a-1e. 42 USCS § 1988—which authorizes awards of reasonable attorneys' fees to prevailing parties, other than the United States, in certain

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15 Am Jur 2d, Civil Rights § 278

6 Federal Procedure, L Ed, Civil Rights §§ 11:131-11:188

5 Federal Procedural Forms, L Ed, Civil Rights §§ 10:601-10:691

2 Am Jur Proof of Facts 233, Attorneys' Fees

1 Am Jur Trials 93, Setting the Fee

42 USCS § 1988

L Ed Digest, Civil Rights § 79

L Ed Index, Attorneys' Fees; Civil Rights and Discrimination; Pro Se

Index to Annotations, Attorneys' Fees; Civil Rights Attorney's Fees Awards Act; Discrimination; Pro Se

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to awards of attorneys' fees in federal civil rights cases. 87 L Ed 2d 713.

Supreme Court's views as to requisites for award of attorneys' fees. 77 L Ed 2d 1540.

Award of attorneys' fees to pro se litigant under 42 USCS § 1988. 82 ALR Fed 800.

Appealability, under 28 USCS § 1291, of order awarding or denying attorneys' fees. 73 ALR Fed 271.

Recovery of additional attorney fees for time spent establishing original entitlement to attorney fees under 42 USCS § 1988. 69 ALR Fed 712.

Construction and application of Civil Rights Attorney's Fee Awards Act of 1976 (amending 42 USCS § 1988), providing that court may allow prevailing party, other than United States, reasonable attorney's fee in certain civil rights actions. 43 ALR Fed 243.

Right of party who is attorney and appears for himself to award of attorney's fees against opposing party as element of costs. 78 ALR3d 1119.

civil rights actions—does not authorize the award of an attorney's fee in a civil rights case to a pro se litigant who is also an attorney, because (1) the word "attorney" assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for a fee award under § 1988; (2) that Congress intended organizations to receive attorneys' fees awards under § 1988 even when representing themselves does not mean that an individual attorney should receive a fee award when representing himself, inasmuch as an organization is always represented by counsel and thus there is always an attorney-client relationship; (3) the overriding concern of § 1988 is the interest in obtaining independent counsel for victims of civil rights violations in order to insure the effective prosecution of meritorious claims; (4) even a skilled lawyer who represents himself is at a disadvantage in contested litigation, inasmuch as (a) ethical considerations may make it inappropriate for him to appear as a witness, and (b) he is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom; (5) a rule that authorizes awards of counsel fees to pro se litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf; and (6) the statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Civil Rights § 79 — attorneys' fees

2. Under 42 USCS § 1988—which authorizes awards of reasonable attorneys' fees to prevailing parties, other than the United States, in certain civil rights actions—a pro se litigant who is not a lawyer is not entitled to attorney's fees.

SYLLABUS BY REPORTER OF DECISIONS

After respondent Kentucky Board of Elections denied petitioner Kay's request to have his name placed on a primary ballot for President of the United States, Kay, an attorney licensed to practice in Florida, filed a civil rights action on his own behalf in the District Court, challenging the constitutionality of the state statute on which the Board relied. Although he prevailed on the merits, the court denied his request for attorney's fees under 42 USC § 1988 [42 USCS § 1988], and the Court of Appeals affirmed.

Held: A pro se litigant who is also a lawyer may not be awarded attorney's fees under § 1988. Neither § 1988's text nor its legislative history provides a clear answer to the question whether a lawyer who represents himself should be treated like a client who has an independent attorney or like other pro se litigants, who, the Court of Appeals have correctly decided, are not entitled to attorney's fees. However, § 1988's overriding concern is with obtaining independent counsel for

victims of civil rights violations in order to ensure the effective prosecution of meritorious claims. That policy is best served by a rule that creates an incentive to retain counsel in every case rather than a disincentive to employ counsel whenever a plaintiff considers himself competent to litigate on his own behalf. Even a skilled lawyer who represents himself is at a disadvantage in contested litigation because ethical considerations may make it inappropriate for him to appear as a witness, and because he is deprived of the judgment of an independent third party during the litigation.

900 F2d 967, affirmed.

Stevens, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Timothy B. Dyk argued the cause for petitioner.

Ann M. Sheadel argued the cause for respondents.

Robert A. Long, Jr. argued the cause for the United States as amicus curiae, in support of respondents, by special leave of court.

Briefs of Counsel, p 801, infra.

OPINION OF THE COURT

[499 US 433]

Justice **Stevens** delivered the opinion of the Court.

[1a] The question is whether an attorney who represents himself in a successful civil rights action may be awarded "a reasonable attorney's fee as part of the costs" under 42 USC § 1988 [42 USCS § 1988].[1]

Petitioner is licensed to practice law in Florida. In 1980, he requested the Kentucky Board of Elections (Board) to place his name on the Democratic Party's primary ballot for the office of President of the United States. Because the members of the Board concluded that he was not a candidate who was "generally advocated and nationally recognized" within the meaning of the controlling Kentucky statute, Ky

[499 US 434]

Rev Stat Ann § 118.580 (Michie 1982) (repealed in 1982), the Board refused his request.

Petitioner filed a successful action on his own behalf in the District Court, challenging the constitutionality of the Kentucky statute. Kay v Mills, 490 F Supp 844, 852-853 (ED Ky 1980). The District Court held that the statute was invalid and entered an injunction requiring that petitioner's name appear on the ballot. Id., at 855. Two years later, the Kentucky General Assembly repealed the statute. In 1986, however, it enacted an identically worded statute, Ky Rev Stat Ann § 118.581 (Michie 1982 and Supp 1988). In 1987, petitioner again requested that his name appear on the primary ballot, and when the Board initially refused his request, petitioner again brought suit in the District Court, and prevailed.[2] This time, however, he re-

1. The Civil Rights Attorney's Fees Awards Act of 1976, Pub L 94-559, 90 Stat 2641, as amended, 42 USC § 1988 [42 USCS § 1988].

2. When the Board determined that petitioner was the same person who had successfully challenged Kentucky's primary election law in 1980, the Board added petitioner's name to the ballot. The Magistrate found that the case was not moot at that point because "[t]he laws in question remain on the books and the problem posed for voters and future candidates, including the [petitioner], remains unsolved without action." App to Pet for Cert 20a-21a (citation omitted).

quested a fee award under 42 USC § 1988 [42 USCS § 1988].[3]

The District Court denied petitioner's request for attorney's fees under § 1988 based on Falcone v IRS, 714 F2d 646 (CA6 1983), cert denied, 466 US 908, 80 L Ed 2d 162, 104 S Ct 1689 (1984).[4] App

[499 US 435]

to Pet for Cert 14a. The United States Court of Appeals for the Sixth Circuit affirmed. 900 F2d 967 (1990). The majority read the language of the statute as assuming the existence of "a paying relationship between an attorney and a client." Id., at 971. Moreover, it concluded that the purpose of the statute was best served when a plaintiff hired an objective attorney—rather than serving as both claimant and advocate—to provide a "filtering of meritless claims." Ibid. The dissenting judge emphasized the statutory goals of promoting lawsuits that protect civil rights and relieving the prevailing party of the burdens of litigation. Id., at 972-973.

[1b, 2] We granted certiorari, 498 US 807, 112 L Ed 2d 15, 111 S Ct 38 (1990), to resolve the conflict among the Circuits on the question whether a pro se litigant who is also a lawyer may be awarded attorney's fees under § 1988. The Circuits are in agreement, however, on the proposition that a pro se litigant who is *not* a lawyer is *not* entitled to attorney's fees.[5] Petitioner does not disagree with these cases, see Brief for Petitioner 9, n 4, and we are also satisfied that they were correctly decided. The question then is whether a lawyer who represents himself should be treated like other pro se litigants or like a client who has had the benefit of the advice and advocacy of an independent attorney.

[1c] We do not think either the text of the statute or its legislative history provides a clear answer. On the one hand, petitioner is an "attorney," and has obviously handled his professional responsibilities in this case in a competent manner. On the other hand, the word "attorney" assumes an agency

[499 US 436]

relationship,[6] and it seems likely that Congress contem-

3. Petitioner requested both costs and an attorney's fee and was awarded the former, but not the latter. Only the attorney's fee is at issue before us.

4. In Falcone, the Court of Appeals declined to award attorney's fees to a pro se attorney in a successful action under the Freedom of Information Act (FOIA), 5 USC § 552 [5 USCS § 552]. The Court of Appeals reasoned that attorney's fees in FOIA actions were inappropriate because the award was intended "to relieve plaintiffs with legitimate claims of the burden of legal costs" and "to encourage potential claimants to seek legal advice before commencing litigation." 714 F2d, at 647. The court relied on the fact that "[a]n attorney who represents himself in litigation may have the necessary legal expertise but is unlikely to have the 'detached and objective perspective' necessary to fulfill the aims of the Act." Ibid. (citation omitted).

5. See, e. g., Gonzalez v Kangas, 814 F2d 1411 (CA9 1987); Smith v DeBartoli, 769 F2d 451, 453 (CA7 1985), cert denied, 475 US 1067, 89 L Ed 2d 606, 106 S Ct 1380 (1986); Turman v Tuttle, 711 F2d 148 (CA10 1983) (per curiam); Owens-El v Robinson, 694 F2d 941 (CA3 1982); Wright v Crowell, 674 F2d 521 (CA6 1982) (per curiam); Cofield v Atlanta, 648 F2d 986, 987-988 (CA5 1981); Lovell v Snow, 637 F2d 170 (CA1 1981); Davis v Parratt, 608 F2d 717 (CA8 1979) (per curiam).

6. The definition of the word "attorney" in Webster's Dictionary reads as follows:
"[O]ne who is legally appointed by another to transact business for him; specif: a legal agent qualified to act for suitors and defendants in legal proceedings." Webster's New Collegiate Dictionary 73 (1975).
Other dictionaries, both popular and special-

plated an attorney-client relationship as the predicate for an award under § 1988.[7] Although this section was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.[8]

[499 US 437]

[1e] In the end, we agree with the Court of Appeals that the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness.[9] He is deprived of the judgment of an

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ized, also emphasize the agency relationship between an attorney and his client in their definitions of "attorney." See, e. g., American Heritage Dictionary 140 (Second College ed 1982) ("A person legally appointed to act for another, esp. an attorney at law"); Black's Law Dictionary 128 (6th ed 1990) ("[A]n agent or substitute, or one who is appointed and authorized to act in the place or stead of another. An agent, or one acting on behalf of another"); 1 Compact Edition of the Oxford English Dictionary 553 (1981 ed) ("One appointed or ordained to act for another; an agent, deputy, commissioner").

7. **[1d]** Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a pro se litigant because the organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship.

8. Both the Senate and House Reports explain that the attorney's fee provision was intended to give citizens access to legal assistance so that they could enforce their civil rights:

"In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, . . . then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S Rep No. 94-1011, p 2 (1976).

The House Report, accompanying a bill that was similar in wording to the enacted Senate bill, expressed the same concern:

"Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [this bill] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." HR Rep No. 94-1558, p 1 (1976).

In their hearings, both Senate and House Subcommittees focused on the need of average citizens to be able to afford lawyers so that they could protect their rights in court. See, e. g., Legal Fees, Hearings before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong, 1st Sess, pp 1-2, 3-4, 273 (1973) (addressing question whether coal miners were receiving adequate legal coverage); id., at 466, 470-471, 505-509, 515 (addressing question whether veterans were denied legal assistance by $10 contingent fee); id., at 789, 808-810 (Indians' access to lawyers); id., at 1127, 1253-1254 (average citizen cannot afford attorney); Awarding of Attorneys' Fees, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong, 1st Sess pp 60, 189, 192, 254-256, 292, 328 (1975) (private citizens needed fee-shifting provisions to be made whole again).

9. The ABA Model Code of Professional Responsibility (1977) describes the potential conflict:

"The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." EC 5-9.

independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The

[499 US 438]

adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

A rule that authorizes awards of counsel fees to pro se litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

[499 US 439]

TIMOTHY J. LEATHERS, Commissioner of Revenues of Arkansas, Petitioner

v

DANIEL L. MEDLOCK et al. (No. 90-29)

DANIEL L. MEDLOCK, et al., Petitioners

v

TIMOTHY J. LEATHERS, Commissioner of Revenues of Arkansas, et al. (No. 90-38)

499 US 439, 113 L Ed 2d 494, 111 S Ct 1438

[Nos. 90-29 and 90-38]

Argued January 9, 1991. Decided April 16, 1991.

Decision: Arkansas held not to have violated Federal Constitution's First Amendment by extending generally applicable sales tax to cable television services, while exempting print media from such tax.

SUMMARY

Arkansas imposed a tax on receipts from the sale of all tangible personal property and of a broad range of specified services. The tax statute expressly exempted receipts from subscription and over-the-counter newspaper sales and subscription magazine sales. In 1987, the statute was amended so as to impose the sales tax on cable television services. The tax affected approximately 100 cable television operators that offered a wide variety of programming—a mixture of news, information, and entertainment—throughout the state. A cable television subscriber, along with a cable television operator and a trade organization of Arkansas cable operators, brought a class action in the Arkansas Chancery Court against the Arkansas commissioner of revenues and other state and local officials, in which action it was argued that the imposition of the sales tax on cable services, and the exemption or exclusion of newspapers, magazines, and satellite television broadcast services, violated the plaintiff taxpayers' rights under the Federal Constitution's First Amendment and the equal protection clause of the Federal

Briefs of Counsel, p 802, infra.

Constitution's Fourteenth Amendment. The Chancery Court, although initially granting the taxpayers' motion for a preliminary injunction, ultimately upheld the constitutionality of the sales tax as applied to cable television services, and dissolved the preliminary injunction. In 1989, shortly after the Chancery Court issued its decision, Arkansas again amended the tax statute so as to extend the sales tax to satellite television broadcast services provided to home dish-antennae owners. On appeal to the Supreme Court of Arkansas, the taxpayers argued that the sales tax statute, as so amended, continued to discriminate unconstitutionally against cable television services. The Supreme Court of Arkansas, reversing and remanding, (1) held that the First Amendment (a) does not prohibit the differential taxation of different media, but (b) prohibits discriminatory taxation among members of the same medium; (2) found that cable television services and satellite broadcast services to home dish-antennae owners were substantially the same medium; (3) held that the sales tax violated the First Amendment for the period during which cable services but not satellite broadcast services were subject to the tax; and (4) held that the illegality of the tax under the First Amendment was cured by the application of the tax to satellite broadcast services (301 Ark 483, 785 SW2d 202). Both the taxpayers and the officials petitioned the United States Supreme Court for certiorari.

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by O'CONNOR, J., joined by REHNQUIST, Ch. J., and WHITE, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., it was held that (1) differential taxation of speakers, even of members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas; (2) it was not a violation of the First Amendment to extend the sales tax to cable and satellite television services, or to cable television services alone, while exempting the print media from the tax, because (a) the tax did not single out the press and did not therefore threaten to hinder the press as a watchdog of government activity, (b) there was no indication that the state had targeted cable television in a purposeful attempt to interfere with its First Amendment activities, nor was the tax structured so as to raise suspicion that it was intended to do so, since the tax structure, under the circumstances, did not resemble a penalty for particular speakers or particular ideas, and (c) the tax was not content based, as there was nothing in the tax statute's language that referred to the content of mass media communications, and there was no evidence that the material offered by cable television differed systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines; (3) even if the tax statute discriminated among media, or discriminated for a time within a medium, this did not, by itself, present a basis for concluding that the tax violated the First Amendment, absent any evidence of intent to suppress speech or of any effect on the expression of particular ideas; and (4) it would be left to the Supreme Court of Arkansas to address, on remand, the question whether the temporary tax distinction between cable and satellite services violated the equal protection clause.

MARSHALL, J., joined by BLACKMUN, J., dissenting, expressed the view that

(1) the First Amendment prohibits a state from singling out a particular information medium for heavier tax burdens than are borne by like-situated media; and (2) it was a violation of the First Amendment to tax cable operators more heavily than other media, since (a) there was no showing that such differential treatment was justified by some special characteristic of the cable television medium, and (b) Arkansas' interest in raising revenue was not sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle.

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16A Am Jur 2d, Constitutional Law § 523; 68 Am Jur 2d, Sales and Use Taxes §§ 46, 99, 109; 74 Am Jur 2d, Telecommunications §§ 184, 186

USCS, Constitution, Amendment 1

L Ed Digest, Constitutional Law §§ 937, 955; Sales and Use Taxes § 2

L Ed Index, Cable Television; Freedom of Speech and Press; Sales and Use Taxes; Taxes

Index to Annotations, Cable Television; Freedom of Speech and Press; Sales and Use Taxes; Taxes

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ANNOTATION REFERENCES

Tax legislation as violating Federal Constitution's First Amendment—Supreme Court cases. 103 L Ed 2d 951.

State sales or use tax as violating equal protection clause of Federal Constitution's Fourteenth Amendment—Supreme Court cases. 86 L Ed 2d 735.

First Amendment guaranty of free speech and press as applied to licensing and regulation of broadcast media. 69 L Ed 2d 1110.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Cable television equipment or services as subject to sales or use tax. 5 ALR4th 754.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 937; Sales and Use Taxes § 2 — First Amendment — cable television

1a-1f. A state does not violate the Federal Constitution's First Amendment by extending a generally applicable sales tax to cable and satellite television services, or to cable television services alone, while exempting the print media from the tax, where (1) the tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity, (2) there is no indication that the state has targeted cable television in a purposeful attempt to interfere with its First Amendment activities, nor is the tax structured so as to raise suspicion that it was intended to do so, (3) the tax affects approximately 100 cable television operators that offer a wide variety of programming throughout the state, so that the tax structure does not resemble a penalty for particular speakers or particular ideas, and (4) the tax is not content based, given that (a) there is nothing in the tax statute's language that refers to the content of mass media communications, and (b) there is no evidence that the material offered by cable television—a mixture of news, information, and entertainment—differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines; even if the tax statute discriminates among media or discriminated for a time within a medium—in that the statute exempts subscription and over-the-counter newspaper sales and subscription magazine sales, and temporarily distinguished between cable and satellite television services—this does not, by itself, present a basis for concluding that the tax violates the First Amendment, absent any evidence of intent to suppress speech or of any effect on the expression of particular ideas. (Marshall and Blackmun, JJ., dissented from this holding.)

Constitutional Law § 937 — cable television — First Amendment

2. Cable television, which provides to its subscribers news, information, and entertainment, is engaged in "speech" under the Federal Constitution's First Amendment and is, in much of its operation, part of the "press" for First Amendment purposes.

Constitutional Law § 955 — First Amendment — differential taxation of speakers or press

3a, 3b. For purposes of the Federal Constitution's First Amendment, differential taxation of speakers is constitutionally suspect when such taxation threatens to suppress the expression of particular ideas or viewpoints; absent a compelling justification, the government may not exercise its taxing power to single out the press, since (1) the press plays a unique role as a check on government abuse, and (2) a tax limited to the press raises concerns about censorship of critical information and opinion; a tax is also suspect if it targets a small group of speakers, since such a tax raises the fear of censorship of particular ideas or viewpoints; a tax will trigger heightened scrutiny under the First Amendment if the tax discriminates on the basis of the content of taxpayer speech; however, differential taxation of speakers, even of members of the press, does not implicate

the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. (Marshall and Blackmun, JJ., dissented in part from this holding.)

Constitutional Law § 925 — free expression

4. The federal constitutional right of free expression is intended to remove governmental restraints from the arena of public discussion and to put the decision as to what views shall be voiced largely into the hands of the people.

Taxes § 16 — statutory classifications

5. Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.

Constitutional Law § 925 — differential burdens on speakers

6. Governmental action that places differential burdens on speakers is insufficient by itself to raise concerns as to the validity of such action under the Federal Constitution's First Amendment.

Appeal § 1750 — issue to be considered on remand

7. On certiorari to review a decision by a state's highest court—which (1) held that the state's tax distinction between cable television services and satellite television services violated the Federal Constitution's First Amendment, but (2) did not reach the question whether such a distinction violated the equal protection clause of the Federal Constitution's Fourteenth Amendment—the United States Supreme Court, upon reversing the state court's judgment as to the First Amendment issue and remanding the case for further proceedings, will leave it to the state court to address the equal protection question on remand.

SYLLABUS BY REPORTER OF DECISIONS

Arkansas' Gross Receipts Act imposes a tax on receipts from the sale of all tangible personal property and specified services, but expressly exempts, inter alia, certain receipts from newspaper and magazine sales. In 1987, Act 188 amended the Gross Receipts Act to impose the tax on cable television. Petitioners in No. 90-38, a cable television subscriber, a cable operator, and a cable trade organization (cable petitioners), brought this class action in the State Chancery Court, contending that their expressive rights under the First Amendment and their rights under the Equal Protection Clause of the Fourteenth Amendment were violated by the extension of the tax to cable services, the exemption from the tax of newspapers and magazines, and the exclusion from the list of services subject to the tax of scrambled satellite broadcast television services to home dish-antennae owners. In 1989, shortly after the Chancery Court upheld the constitutionality of Act 188, Arkansas adopted Act 769, which extended the tax to, among other things, all television services to paying customers. On appeal, the State Supreme Court held that the tax was not invalid after the passage of Act 769 because the Constitution does not prohibit the differential taxation of different media. However, believing that the First Amendment does prohibit discriminatory taxation among members of the same medium, and that cable and scrambled satellite television services were "substantially the

same," the Supreme Court held that the tax was unconstitutional for the period during which it applied to cable but not satellite broadcast services.

Held:

1. Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

(a) Although cable television, which provides news, information, and entertainment to its subscribers, is engaged in "speech" and is part of the "press" in much of its operation, the fact that it is taxed differently from other media does not by itself raise First Amendment concerns. The Arkansas tax presents none of the First Amendment difficulties that have led this Court to strike down differential taxation of speakers. See, e.g., Grosjean v American Press Co., 297 US 233, 80 L Ed 660, 54 S Ct 444; Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue, 460 US 575, 75 L Ed 2d 295, 103 S Ct 1365; Arkansas Writers' Project, Inc. v Ragland, 481 US 221, 95 L Ed 2d 209, 107 S Ct 1722. It is a tax of general applicability covering all tangible personal property and a broad range of services and, thus, does not single out the press and thereby threaten to hinder it as a watchdog of government activity. Furthermore, there is no indication that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities, nor is the tax structured so as to raise suspicion that it was intended to do so. Arkansas has not selected a small group of speakers to bear fully the burden of the tax, since, even if the State Supreme Court's finding that cable and satellite television are the same medium is accepted, Act 188 extended the tax uniformly to the approximately 100 cable systems then operating in the State. Finally, the tax is not content based, since there is nothing in the statute's language that refers to the content of mass media communications, and since the record contains no evidence that the variety of programming cable television offers subscribers differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines.

(b) Thus, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated their First Amendment rights. See Arkansas Writers', supra, at 233, 95 L Ed 2d 209, 107 S Ct 1722. This Court's decisions do not support their argument that such a basis exists here because the tax discriminates among media and discriminated for a time within a medium. Taken together, cases such as Regan v Taxation with Representation of Wash., 461 US 540, 76 L Ed 2d 129, 103 S Ct 1997, Mabee v White Plains Publishing Co. 327 US 178, 90 L Ed 607, 66 S Ct 511, and Oklahoma Press Publishing Co. v Walling, 327 US 186, 90 L Ed 614, 66 S Ct 494, establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. Nothing about Arkansas' choice to exclude or exempt certain media from its tax has ever suggested an interest in censoring the expressive activities of cable television. Nor does

anything in the record indicate that this broad-based, content-neutral tax is likely to stifle the free exchange of ideas.

2. The question whether Arkansas' temporary tax distinction between cable and satellite services violated the Equal Protection Clause must be addressed by the State Supreme Court on remand.

301 Ark 483, 785 SW2d 202, affirmed in part, reversed in part, and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Stevens, Scalia, Kennedy, and Souter, JJ., joined. Marshall, J., filed a dissenting opinion, in which Blackmun, J., joined.

APPEARANCES OF COUNSEL

William E. Keadle argued the cause for petitioner in 90-29 and for respondents in 90-38.

Eugene G. Sayre argued the cause for petitioners in 90-38 and for respondents in 90-29.

Briefs of Counsel, p 802, infra.

OPINION OF THE COURT

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Justice **O'Connor** delivered the opinion of the Court.

[1a] These consolidated cases require us to consider the constitutionality of a state sales tax that excludes or exempts certain segments of the media but not others.

I

Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services. Ark Code Ann §§ 26-52-301, 26-52-302 (1987 and Supp 1989). The Act exempts from the tax certain sales of goods and services. § 26-52-401 (Supp 1989). Counties

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within Arkansas impose a 1% tax on all goods and services subject to taxation under the Gross Receipts Act, §§ 26-74-307, 26-74-222 (1987 and Supp 1989), and cities may impose a further ½% or 1% tax on these items, § 26-75-307 (1987).

The Gross Receipts Act expressly exempts receipts from subscription and over-the-counter newspaper sales and subscription magazine sales. See §§ 26-52-401(4), (14) (Supp 1989); Revenue Policy Statement 1988-1 (Mar. 10, 1988), reprinted in CCH Ark Tax Rep ¶ 69-415. Before 1987, the Act did not list among those services subject to the sales tax either cable television[1] or scrambled satellite broadcast television services to home dish-antennae owners.[2]

Daniel L. Medlock, a cable television subscriber, Community Commu-

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1. Cable systems receive television, radio, or other signals through antennae located at their so-called "headends." Information gathered in this way, as well as any other material that the system operator wishes to transmit, is then conducted through cables strung over utility poles and through underground conduits to subscribers. See generally D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video: Law and Policy § 1.03 (1989).

2. Satellite television broadcast services transmit over-the-air "scrambled" signals directly to the satellite dishes of subscribers, who must pay for the right to view the signals. See generally A. Easton & S. Easton, The Complete Sourcebook of Home Satellite TV 57-66 (1988).

nications Co., a cable television operator, and the Arkansas Cable Television Association, Inc., a trade organization composed of approximately 80 cable operators with systems throughout the State (cable petitioners), brought this class action in the Arkansas Chancery Court to challenge the extension of the sales tax to cable television services. Cable petitioners contended that their expressive activities are protected by the First Amendment and are comparable to those of news papers, magazines, and scrambled satellite broadcast television. They argued that Arkansas' sales taxation

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of cable services, and exemption or exclusion from the tax of newspapers, magazines, and satellite broadcast services, violated their constitutional rights under the First Amendment and under the Equal Protection Clause of the Fourteenth Amendment.

The Chancery Court granted cable petitioners' motion for a preliminary injunction, requiring Arkansas to place in escrow the challenged sales taxes and to keep records identifying collections of the taxes. Both sides introduced extensive testimony and documentary evidence at the hearing on this motion and at the subsequent trial. Following the trial, the Chancery Court concluded that cable television's necessary use of public rights-of-way distinguishes it for constitutional purposes from other media. It therefore upheld the constitutionality of Act 188, dissolved its preliminary injunction, and ordered all funds collected in escrow released.

In 1989, shortly after the Chancery Court issued its decision, Arkansas adopted Act 769, which extended the sales tax to "all other distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers or users." 1989 Ark Gen Acts, No. 769, § 1. On appeal to the Arkansas Supreme Court, cable petitioners again challenged the State's sales tax on the ground that, notwithstanding Act 769, it continued unconstitutionally to discriminate against cable television. The Supreme Court rejected the claim that the tax was invalid after the passage of Act 769, holding that the Constitution does not prohibit the differential taxation of different media. Medlock v Pledger, 301 Ark 483, 487, 785 SW2d 202, 204 (1990). The court believed, however, that the First Amendment prohibits discriminatory taxation among members of the same medium. On the record before it, the court found that cable television services and satellite broadcast services to home dish-antennae owners were "substantially the same." Ibid. The State Supreme Court rejected the Chancery Court's conclusion that cable television's use of public

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rights-of-way justified its differential sales tax treatment, explaining that cable operators already paid franchise fees for that right. Id., at 485, 785 SW2d, at 203. It therefore held that Arkansas' sales tax was unconstitutional under the First Amendment for the period during which cable television, but not satellite broadcast services, were subject to the tax. Id., at 487; 785 SW2d, at 204.

Both cable petitioners and the Arkansas Commissioner of Revenues petitioned this Court for certiorari. We consolidated these petitions and granted certiorari, Pledger v Medlock, 498 US 809, 112 L Ed 2d 18, 111 S Ct 41 (1990), in

order to resolve the question, left open in Arkansas Writers' Project, Inc. v Ragland, 481 US 221, 233, 95 L Ed 2d 209, 107 S Ct 1722 (1987), whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media.

II

[1b, 2] Cable television provides to its subscribers news, information, and entertainment. It is engaged in "speech" under the First Amendment, and is, in much of its operation, part of the "press." See Los Angeles v Preferred Communications, Inc. 476 US 488, 494, 90 L Ed 2d 480, 106 S Ct 2034 (1986). That it is taxed differently from other media does not by itself, however, raise First Amendment concerns. Our cases have held that a tax that discriminates among speakers is constitutionally suspect only in certain circumstances.

In Grosjean v American Press Co. 297 US 233, 80 L Ed 660, 54 S Ct 444 (1936), the Court considered a First Amendment challenge to a Louisiana law that singled out publications with weekly circulations above 20,000 for a 2% tax on gross receipts from advertising. The tax fell exclusively on 13 newspapers. Four other daily newspapers and 120 weekly newspapers with weekly circulations of less than 20,000 were not taxed. The Court discussed at length the pre-First Amendment English and American tradition of taxes imposed exclusively on the press. This invidious form of censorship was intended to curtail the circulation of newspapers and thereby prevent the

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people from acquiring knowledge of government activities. Id., at 246-251, 80 L Ed 660, 54 S Ct 444. The Court held that the tax at issue in Grosjean was of this type and was therefore unconstitutional. Id., at 250, 80 L Ed 660, 54 S Ct 444.

In Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue, 460 US 575, 75 L Ed 2d 295, 103 S Ct 1365 (1983), we noted that it was unclear whether the result in Grosjean depended on our perception in that case that the State had imposed the tax with the intent to penalize a selected group of newspapers or whether the structure of the tax was sufficient to invalidate it. See 460 US, at 580, 75 L Ed 2d 295, 103 S Ct 1365 (citing cases and commentary). Minneapolis Star resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds: "Illicit legislative intent is not the sine qua non of a violation of the First Amendment." Id., at 592, 75 L Ed 2d 295, 103 S Ct 1365.

At issue in Minneapolis Star was a Minnesota special use tax on the cost of paper and ink consumed in the production of publications. The tax exempted the first $100,000 worth of paper and ink consumed annually. Eleven publishers, producing only 14 of the State's 388 paid circulation newspapers, incurred liability under the tax in its first year of operation. The Minneapolis Star & Tribune Co. (Star Tribune) was responsible for roughly two-thirds of the total revenue raised by the tax. The following year, 13 publishers, producing only 16 of the State's 374 paid circulation papers, paid the tax. Again, the Star Tribune bore roughly two-thirds of the tax's burden. We found no evidence of imper-

missible leagislative motive in the case apart from the structure of the tax itself.

We nevertheless held the Minnesota tax unconstitutional for two reasons. First, the tax singled out the press for special treatment. We noted that the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from this political

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constraint. See id., at 585, 75 L Ed 2d 295, 103 S Ct 1365. Given "the basic assumption of our political system that the press will often serve as an important restraint on government," we feared that the threat of exclusive taxation of the press could operate "as effectively as a censor to check critical comment." Ibid. "Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment," that it is presumptively unconstitutional. Ibid.

Beyond singling out the press, the Minnesota tax targeted a small group of newspapers—those so large that they remained subject to the tax despite its exemption for the first $100,000 of ink and paper consumed annually. The tax thus resembled a penalty for certain newspapers. Once again, the scheme appeared to have such potential for abuse that we concluded that it violated the First Amendment: "[W]hen the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises." Id., at 592, 75 L Ed 2d 295, 103 S Ct 1365.

Arkansas Writers' Project, Inc. v Ragland, 481 US 221, 95 L Ed 2d 209, 107 S Ct 1722 (1987), reaffirmed the rule that selective taxation of the press through the narrow targeting of individual members offends the First Amendment. In that case, Arkansas Writers' Project sought a refund of state taxes it had paid on sales of the Arkansas Times, a general interest magazine, under Arkansas' Gross Receipts Act of 1941. Exempt from the sales tax were receipts from sales of religious, professional, trade and sports magazines. See id., at 224-226, 95 L Ed 2d 209, 107 S Ct 1722. We held that Arkansas' magazine exemption, which meant that only "a few Arkansas magazines pay any sales tax," operated in much the same way as did the $100,000 exemption in Minneapolis Star and therefore suffered from the same type of discrimination identified in that case. Id., at 229, 95 L Ed 2d 209, 107 S Ct 1722. Moreover, the basis on which the tax differentiated among magazines depended entirely on their content. Ibid.

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[3a] These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. See Grosjean, 297 US, at 244-249, 80 L Ed 660, 56 S Ct 444; Minneapolis Star, 460 US, at 585, 75 L Ed 2d 295, 103 S Ct 1365. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small

group of speakers. See id., at 575, 75 L Ed 2d 295, 103 S Ct 1365; Arkansas Writers', 481 US, at 229, 95 L Ed 2d 209, 107 S Ct 1722. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. See id., at 229-231, 95 L Ed 2d 209, 107 S Ct 1722.

[1c] The Arkansas tax at issue here presents none of these types of discrimination. The Arkansas sales tax is a tax of general applicability. It applies to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions. Among the services on which the tax is imposed are natural gas, electricity, water, ice, and steam utility services; telephone, telecommunications, and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing, replacement, and repair services; printing of all kinds; tickets for admission to places of amusement or athletic, entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities. See Ark Code Ann § 26-52-301 (Supp 1989). The tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity. Cf. Minneapolis Star, supra, at 585, 75 L Ed 2d 295, 103 S Ct 1365. We have said repeatedly that a State may impose on the press a generally applicable tax. See Jimmy Swaggart Ministries

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v Board of Equalization of Cal., 493 US 378, 387-388, 107 L Ed 2d 796, 110 S Ct 688 (1990); Arkansas Writers', supra, at 229, 95 L Ed 2d 209, 107 S Ct 1722; Minneapolis Star, supra, at 586, and n 9, 75 L Ed 2d 295, 103 S Ct 1365.

Furthermore, there is no indication in this case that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities. Nor is the tax one that is structured so as to raise suspicion that it was intended to do so. Unlike the taxes involved in Grosjean and Minneapolis Star, the Arkansas tax has not selected a narrow group to bear fully the burden of the tax.

The tax is also structurally dissimilar to the tax involved in Arkansas Writers'. In that case, only "a few" Arkansas magazines paid the State's sales tax. See Arkansas Writers', 481 US, at 229, and n 4, 75 L Ed 2d 295, 103 S Ct 1365. Arkansas Writers' Project maintained before the Court that the Arkansas Times was the only Arkansas publication that paid sales tax. The Commissioner contended that two additional periodicals also paid the tax. We responded that, "[w]hether there are three Arkansas magazines paying tax or only one, the burden of the tax clearly falls on a limited group of publishers." Id., at 229, n 4, 75 L Ed 2d 295, 103 S Ct 1365. In contrast, Act 188 extended Arkansas' sales tax uniformly to the approximately 100 cable systems then operating in the State. See App to Pet for Cert in No. 90-38, p 12a. While none of the seven scrambled satellite broadcast services then available in Arkansas, Tr 12 (Aug. 19, 1987), was taxed until Act 769 became effective, Arkansas' extension of its sales tax to cable television hardly resembles a

"penalty for a few." See Minneapolis Star, supra, at 592, 75 L Ed 2d 295, 103 S Ct 1365; Arkansas Writers', supra, at 229, and n 4, 75 L Ed 2d 295, 103 S Ct 1365.

[1d, 4] The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas. "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion,

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putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." Cohen v California, 403 US 15, 24, 29 L Ed 2d 284, 91 S Ct 1780 (1971). There is no comparable danger from a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State. That the Arkansas Supreme Court found cable and satellite television to be the same medium does not change this conclusion. Even if we accept this finding, the fact remains that the tax affected approximately 100 suppliers of cable television services. This is not a tax structure that resembles a penalty for particular speakers or particular ideas.

[1e] Finally, Arkansas' sales tax is not content based. There is nothing in the language of the statute that refers to the content of mass media communications. Moreover, the record establishes that cable television offers subscribers a variety of programming that presents a mixture of news, information, and entertainment. It contains no evidence, nor is it contended, that this material differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines.

Because the Arkansas sales tax presents none of the First Amendment difficulties that have led us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated petitioners First Amendment rights. See Arkansas Writers', supra, at 233, 75 L Ed 2d 295, 103 S Ct 1365. Petitioners argue that such a basis exists here: Arkansas' tax discriminates among media and, if the Arkansas Supreme Court's conclusion regarding cable and satellite television is accepted, discriminated for a time within a medium. Petitioners argue that such intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular

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ideas, violates the First Amendment. Our cases do not support such a rule.

Regan v Taxation with Representation of Wash., 461 US 540, 76 L Ed 2d 129, 103 S Ct 1997 (1983), stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas. In that case, we considered provisions of the Internal Revenue Code that discriminated between contributions to lobbying organizations. One section of the Code conferred tax-exempt status on certain nonprofit organizations that did not engage in lobbying activities. Contributions to those organizations were deductible. Another section of the Code conferred tax-exempt sta-

tus on certain other nonprofit organizations that did lobby, but contributions to them were not deductible. Taxpayers contributing to veterans' organizations were, however, permitted to deduct their contributions regardless of those organizations' lobbying activities.

The tax distinction between these lobbying organizations did not trigger heightened scrutiny under the First Amendment. Id., at 546-551, 76 L Ed 2d 129, 103 S Ct 1997. We explained that a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction.[3] Id., at 546, 76 L Ed 2d 129, 103 S Ct 1997. For this proposition, we relied on Cammarano v United States, 358 US 498, 3 L Ed 2d 462, 79 S Ct 524 (1959). In Cammarano, the Court considered an Internal Revenue regulation that denied a tax deduction for money spent by businesses on publicity programs directed at pending state legislation. The Court held that the regulation did not violate the First Amendment because it did not discriminate on the basis of who was spending the money on

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publicity or what the person or business was advocating. The regulation was therefore "plainly not '"aimed at the suppression of dangerous ideas."'" Id., at 513, 3 L Ed 2d 462, 79 S Ct 524, quoting Speiser v Randall, 357 US 513, 519, 2 L Ed 2d 1460, 78 S Ct 1332 (1958).

[5] Regan, while similar to Cammarano, presented the additional fact that Congress had chosen to exempt from taxes contributions to veterans' organizations, while not exempting other contributions. This did not change the analysis. Inherent in the power to tax is the power to discriminate in taxation. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." Regan, supra, at 547, 76 L Ed 2d 129, 103 S Ct 1997. See also Madden v Kentucky, 309 US 83, 87-88, 84 L Ed 590, 60 S Ct 406, 125 ALR 1383 (1940); New York Rapid Transit Corp. v City of New York, 303 US 573, 578, 82 L Ed 1024, 58 S Ct 721 (1938); Magoun v Illinois Trust & Savings Bank, 170 US 283, 284, 42 L Ed 1037, 18 S Ct 594 (1898).

Cammarano established that the government need not exempt speech from a generally applicable tax. Regan established that a tax scheme does not become suspect simply because it exempts only some speech. Regan reiterated in the First Amendment context the strong presumption in favor of duly enacted taxation schemes. In so doing, the Court quoted the rule announced more than 40 years earlier in Madden, an equal protection case:

> " 'The broad discretion as to classification possessed by a legislature in the field of taxation has long

3. Certain amici in support of cable petitioners argue that Regan is distinguishable from this case because the petitioners in Regan were complaining that their contributions to lobbying organizations should be tax *deductible*, while cable petitioners complain that sales of their services should be tax *exempt*. This is a distinction without a difference. As we explained in Regan, "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." 461 US, at 544, 76 L Ed 2d 129, 103 S Ct 1997.

been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot

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have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and opressive discrimination against particular persons and classes.' " Madden, supra, at 87-88, 84 L Ed 2d 590, 60 S Ct 406, 125 ALR 1383 (footnotes omitted), quoted in Regan, 461 US, at 547-548, 76 L Ed 2d 129, 103 S Ct 1997.

On the record in Regan, there appeared no such "hostile and oppressive discrimination." We explained that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." Id., at 548, 76 L Ed 2d 129, 103 S Ct 1997 (internal quotation marks omitted). But that was not the case. The exemption for contributions to veterans' organizations applied without reference to the content of the speech involved; it was not intended to suppress any ideas; and there was no demonstration that it had that effect. Ibid. Under these circumstances, the selection of the veterans' organizations for a tax preference was "obviously a matter of policy and discretion." Id., at 549, 76 L Ed 2d 129, 103 S Ct 1997 (internal quotation marks omitted).

[6] That a differential burden on speakers is insufficient by itself to raise First Amendment concerns is evident as well from Mabee v White Plains Publishing Co. 327 US 178, 90 L Ed 607, 66 S Ct 511 (1946), and Oklahoma Press Publishing Co. v Walling, 327 US 186, 90 L Ed 614, 66 S Ct 494, 166 ALR 531 (1946). Those cases do not involve taxation, but they do involve government action that places differential burdens on members of the press. The Fair Labor Standards Act of 1938, 52 Stat 1060, as amended, 29 USC § 201 et seq. [29 USCS §§ 201 et seq.], applies generally to newspapers as to other businesses, but it exempts from its requirements certain small papers. § 213(a)(8). Publishers of larger daily newspapers argued that the differential burden thereby placed on them violates the First Amendment. The Court upheld the exemption because there was no indication that the government had singled out the press for special treatment, Walling, supra, at 194, 90 L Ed 2d 614, 66 S Ct 494, 166 ALR 531, or that the exemption was a " 'deliberate and

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calculated device' " to penalize a certain group of newspapers, Mabee, supra, at 184, 90 L Ed 607, 66 S Ct 511, quoting Grosjean, 297 US, at 250, 80 L Ed 660, 54 S Ct 444.

[1f, 3b] Taken together, Regan, Mabee, and Oklahoma Press establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing,

particular ideas. That was the case in Grosjean, Minneapolis Star, and Arkansas Writers', but it is not the case here. The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

[7] Before the Arkansas Chancery Court, cable petitioners contended that the State's tax distinction between cable and other media violated the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. App to Pet for Cert in No. 90-38, p 21a. The Chancery Court rejected both claims, and cable petitioners challenged these holdings before the Arkansas Supreme Court. That court did not reach the equal protection question as to the State's temporary tax distinction between cable and satellite services because it disallowed that distinction on First Amendment grounds. We leave it to the Arkansas Supreme Court to address this question on remand.

For the foregoing reasons, the judgment of the Arkansas Supreme Court is affirmed in part and reversed in part, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINION

[499 US 454]

Justice **Marshall,** with whom Justice **Blackmun** joins, dissenting.

This Court has long recognized that the freedom of the press prohibits its government from using the tax power to discriminate against individual members of the media or against the media as a whole. See Grosjean v American Press Co. 297 US 233, 80 L Ed 660, 56 S Ct 444 (1936); Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue, 460 US 575, 75 L Ed 2d 295, 103 S Ct 1365 (1983); Arkansas Writers' Project, Inc. v Ragland, 481 US 221, 95 L Ed 2d 209, 107 S Ct 1722 (1987). The Framers of the First Amendment, we have explained, specifically intended to prevent government from using disparate tax burdens to impair the untrammeled dissemination of information. We granted certiorari in this case to consider whether the obligation not to discriminate against individual members of the press prohibits the State from taxing one information medium—cable television—more heavily than others. The majority's answer to this question—that the State is free to discriminate between otherwise like-situated media so long as the more heavily taxed medium is not too "small" in number—is no answer at all, for it fails to explain which media actors are entitled to equal tax treatment. Indeed, the majority so adamantly proclaims the irrelevance of this problem that its analysis calls into question whether any general obligation to treat media actors evenhandedly survives today's decision. Because I believe the

majority has unwisely cut back on the principles that inform our selective-taxation precedents, and because I believe that the First Amendment prohibits the State from singling out a particular information medium for heavier tax burdens than are borne by like-situated media, I dissent.

I

A

Our decisions on selective taxation establish a nondiscrimination principle for like-situated members of the press. Under this principle, "differential treatment, unless justified

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by some special characteristic of the press, . . . is presumptively unconstitutional," and must be struck down "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." Minneapolis Star, supra, at 585, 75 L Ed 2d 295, 103 S Ct 1365.

The nondiscrimination principle is an instance of government's general First Amendment obligation not to interfere with the press as an institution. As the Court explained in Grosjean, the purpose of the Free Press Clause "was to preserve an untrammeled press as a vital source of public information." 297 US, at 250, 80 L Ed 660, 54 S Ct 444. Reviewing both the historical abuses associated with England's infamous " 'taxes on knowledge' " and the debates surrounding ratification of the Constitution, see id., at 246-250, 80 L Ed 660, 54 S Ct 444; Minneapolis Star, 460 US, at 583-586, and nn 6-7, 75 L Ed 2d 295, 103 S Ct 1365, our decisions have recognized that the Framers viewed selective taxation as a distinctively potent "means of abridging the freedom of the press," id., at 586, n 7, 75 L Ed 2d 295, 103 S Ct 1365.

We previously have applied the nondiscrimination principle in two contexts. First, we have held that this principle prohibits the State from imposing on the media tax burdens not borne by like-situated nonmedia enterprises. Thus, in Minneapolis Star, we struck down a use tax that applied to the ink and paper used in newspaper production but not to any other item used as a component of a good to be sold at retail. See id., at 578, 581-582, 75 L Ed 2d 295, 103 S Ct 1365. Second, we have held that the nondiscrimination principle prohibits the State from taxing *individual* members of the press unequally. Thus, as an alternative ground in Minneapolis Star, we concluded that the State's use tax violated the First Amendment because it exempted the first $100,000 worth of ink and paper consumed and thus effectively singled out large publishers for a disproportionate tax burden. See id., at 591-592, 75 L Ed 2d 295, 103 S Ct 1365. Similarly, in Arkansas Writers' Project, we concluded that selective exemptions for certain periodicals rendered unconstitutional the application of a general sales tax to the remaining

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periodicals "because [the tax] [was] not evenly applied to *all* magazines." See 481 US, at 229, 95 L Ed 2d 209, 107 S Ct 1722 (emphasis added); see also Grosjean v American Press Co., supra (tax applied only to newspapers that meet circulation threshold unconstitutionally discriminates against more widely circulated newspapers).

Before today, however, we had not addressed whether the nondiscrimination principle prohibits the State

from singling out a particular information medium for tax burdens not borne by other media. Grosjean and Minneapolis Star both invalidated tax schemes that discriminated between different members of a single medium, namely, newspapers. Similarly, Arkansas Writers' Project invalidated a general sales tax because it "treat[ed] some magazines less favorably than others," 481 US, at 229, 95 L Ed 2d 209, 107 S Ct 1722, leaving open the question whether less favorable tax treatment of magazines than of newspapers furnished an additional ground for invalidating the scheme, see id., at 233, 95 L Ed 2d 209, 107 S Ct 1722. This case squarely presents the question whether the State may discriminate between distinct information media, for under Arkansas' general sales tax scheme, cable operators pay a sales tax on their subscription fees that is not paid by newspaper or magazine companies on their subscription fees or by television or radio broadcasters on their advertising revenues.[1] In my view, the principles

[499 US 457]

that animate our selective-taxation cases clearly condemn this form of discrimination.

B

Although cable television transmits information by distinctive means, the *information service* provided by cable does not differ significantly from the information services provided by Arkansas' newspapers, magazines, television broadcasters, and radio stations. This Court has recognized that cable operators exercise the same core press function of "communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers," Los Angeles v Preferred Communications, Inc. 476 US 488, 494, 90 L Ed 2d 480, 106 S Ct 2034 (1986), and that "[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include," FCC v Midwest Video Corp., 440 US 689, 707, 59 L Ed 2d 692, 99 S Ct 1435 (1979). See also ante, at 444, 113 L Ed 2d, at 502 (acknowledging that cable television is "part of the 'press' "). In addition, the cable-service providers in this case put on extensive and unrebutted proof at trial designed to show that consumers regard the news, sports, and entertainment features provided by cable as largely

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1. Subject to various exemptions, Arkansas law imposes a 4% tax on the receipts from sales of all tangible personal property and of specified services. Ark Code Ann §§ 26-52-301, 26-52-302, 26-52-401 (1987 and Supp 1989). Cable television service is expressly included in the tax. See § 26-52-301(3)(D)(i) (Supp 1989). Proceeds from the sale of newspapers, § 26-52-401(4) (Supp 1989), and from the sale of magazines by subscription, § 26-52-401(14) (Supp 1989); Revenue Policy Statement 1988-1 (Mar. 10, 1988), reprinted in CCH Ark Tax Rep ¶ 69-415, are expressly exempted, as are the proceeds from the sale of advertising in newspapers and other publications, § 26-52-401(13) (Supp 1989). Proceeds from the sale of advertising for broadcast radio and television services are not included in the tax.

Insofar as the Arkansas Supreme Court found that cable and scrambled satellite television are a *single* medium, 301 Ark 483, 487, 785 SW2d 202, 204-205 (1990), this case also involves a straightforward application of Arkansas Writers' Project and Minneapolis Star in resolving the cable operators' constitutional challenge to the taxes that they paid prior to 1989, the year in which Arkansas amended its sales tax to include the subscription fees collected by scrambled-satellite television. I would affirm on that basis the Arkansas Supreme Court's conclusion that the pre-1989 version of the Arkansas sales tax violated the First Amendment by imposing on cable a tax burden not borne by its scrambled satellite television.

interchangeable with the services provided by other members of the
[499 US 458]
print and electronic media. See App 81-85, 100-101, 108, 115, 133-137, 165-170. See generally Competition, Rate Deregulation and the Commission's Policies Relating to Provision of Cable Television Service, 5 FCC Record 4962, 4967 (1990) (discussing competition between cable and other forms of television).

Because cable competes with members of the print and electronic media in the larger information market, the power to discriminate between these media triggers the central concern underlying the nondiscrimination principle: the risk of covert censorship. The nondiscrimination principle protects the press from censorship prophylactically, condemning any selective-taxation scheme that presents the "*potential* for abuse" by the State, Minneapolis Star, 460 US, at 592, 75 L Ed 2d 295, 103 S Ct 1365 (emphasis added), independent of any actual "evidence of an improper censorial motive," Arkansas Writers' Project, supra, at 228, 95 L Ed 2d 209, 107 S Ct 1722; see Minneapolis Star, supra, at 592, 75 L Ed 2d 295, 103 S Ct 1365 ("Illicit legislative intent is not the sine qua non of a violation of the First Amendment"). The power to discriminate among like-situated media presents such a risk. By imposing tax burdens that disadvantage one information medium relative to another, the State can favor those media that it likes and punish those that it dislikes.

Inflicting a competitive disadvantage on a disfavored medium violates the First Amendment "command that the government . . . shall not impede the free flow of ideas." Associated Press v United States, 326 US 1, 20, 89 L Ed 2013, 65 S Ct 1416 (1945). We have previously recognized that differential taxation *within* an information medium distorts the marketplace of ideas by imposing on some speakers costs not borne by their competitors. See Grosjean, 297 US, at 241, 244-245, 80 L Ed 660, 56 S Ct 444 (noting competitive disadvantage arising from differential tax based on newspaper circulation). Differential taxation *across* different media likewise "limit[s] the circulation of information to which the public is entitled," id., at 250, 80 L Ed 660, 56 S Ct 444, where, as here, the
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relevant media compete in the same information market. By taxing cable television more heavily relative to its social cost than newspapers, magzines, broadcast television and radio, Arkansas distorts consumer preferences for particular information formats, and thereby impairs "the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v United States, supra, at 20, 89 L Ed 2013, 65 S Ct 1416.

Because the power selectively to tax cable operators triggers the concerns that underlie the nondiscrimination principle, the State bears the burden of demonstrating that "differential treatment" of cable television is justified by some "special characteristic" of that particular information medium or by some other "counterbalancing interest of compelling importance that [the State] cannot achieve without differential taxation." Minneapolis Star, supra, at 585, 75 L Ed 2d 295, 103 S Ct 1365 (footnote omitted). The State has failed to make such a showing in this case. As the Arkansas Supreme Court found, the

amount collected from the cable operators pursuant to the state sales tax does not correspond to any social cost peculiar to cable-television service, see 301 Ark 483, 485, 785 SW2d 202, 203 (1990); indeed, cable operators in Arkansas must pay a franchise fee expressly designed to defray the cost associated with cable's unique exploitation of public rights of way. See ibid. The only justification that the State asserts for taxing cable operators more heavily than newspapers, magazines, television broadcasters and radio stations is its interest in raising revenue. See Brief for Respondents in No. 90-38, p 9. This interest is not sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle. See Arkansas Writers' Project, 481 US, at 231-232, 95 L Ed 2d 209, 107 S Ct 1722; Minneapolis Star, supra, at 586, 75 L Ed 2d 295, 103 S Ct 1365.[2]

[499 US 460]

II

The majority is undisturbed by Arkansas' discriminatory tax regime. According to the majority, the power to single out cable for heavier tax burdens presents no realistic threat of governmental abuse. The majority also dismisses the notion that the State has any general obligation to treat members of the press evenhandedly. Neither of these conclusions is supportable.

A

The majority dismisses the risk of governmental abuse under the Arkansas tax scheme on the ground that the number of media actors exposed to the tax is "large." Ante, at 449, 113 L Ed 2d, at 505. According to the majority, where a tax is generally applicable to nonmedia enterprises, the selective application of that tax to different segments of the media offends the First Amendment only if the tax is limited to "a small number of speakers," ante, at 448, 113 L Ed 2d, at 505, for it is only under those circumstances that selective taxation "resembles a penalty for particular speakers or particular ideas," ante, at 449, 113 L Ed 2d, at 505. The selective sales tax at issue in Arkansas Writers' Project, the majority points out, applied to no more than three magazines. See ante, at 448, 113 L Ed 2d, at 504. The tax at issue here, "[i]n contrast," applies "uniformly to the approximately *100* cable systems" in operation in Arkansas. Ibid. (emphasis added). In my view, this analysis is overly simplistic and is unresponsive to the concerns that inform our selective-taxation precedents.

To start, the majority's approach provides no meaningful guidance on the intermedia scope of the nondiscrimination principle. From the majority's discussion, we can infer that three is a sufficiently "small" number of affected actors to

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trigger First

2. I need not consider what, if any, state interests might justify selective taxation of cable television, since the State has advanced no interest other than revenue enhancement. I also do not dispute that the unique characteristics of cable may justify special regulatory treatment of that medium. See Los Angeles v Preferred Communications, Inc. 476 US 488, 496, 90 L Ed 2d 480, 106 S Ct 2034 (1986) (Blackmun, J., concurring); cf. Red Lion Broadcasting Co. v FCC, 395 US 367, 386-401, 23 L Ed 2d 371, 89 S Ct 1794 (1969). I conclude only that the State is not free to burden cable with a selective tax absent a clear nexus between the tax and a "special characteristic" of cable television service or a "counter-balancing interest of compelling importance." Minneapolis Star, 460 US, at 585, 75 L Ed 2d 295, 103 S Ct 1365.

Amendment problems and that one hundred is too "large" to do so. But the majority fails to pinpoint the magic number *between* three and one hundred actors above which discriminatory taxation can be accomplished with impunity. Would the result in this case be different if Arkansas had only 50 cable-service providers? Or 25? The suggestion that the First Amendment prohibits selective taxation that "resembles a penalty" is no more helpful. A test that turns on whether a selective tax "penalizes" a particular medium presupposes some baseline establishing that medium's entitlement to equality of treatment with other media. The majority never develops any theory of the State's obligation to treat like-situated media equally, except to say that the State must avoid discriminating against too "small" a number of media actors.

In addition, the majority's focus on absolute numbers fails to reflect the concerns that inform the nondiscrimination principle. The theory underlying the majority's "small versus large" test is that "a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State," ante, at 449, 113 L Ed 2d, at 505, poses no "risk of affecting only a limited range of views," ante, at 448, 113 L Ed 2d, at 505. This assumption is unfounded. The record in this case furnishes ample support for the conclusion that the State's cable operators make unique contributions to the information market. See, e.g., App 82 (testimony of cable operator that he offers "certain religious programming" that "people demand . . . because they otherwise could not have access to it"); id., at 138 (cable offers Spanish-language information network); id., at 150 (cable broadcast of local city council meetings). The majority offers no reason to believe that programs like these are duplicated by other media. Thus, to the extent that selective taxation makes it harder for Arkansas' 100 cable operators to compete with Arkansas' 500 newspapers, magazines, and broadcast television and radio stations, see 1 Gale Directory of Publications and Broadcast Media 67-68

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(123d ed 1991), Arkansas' discriminatory tax *does* "risk . . . affecting only a limited range of views," and may well "distort the market for ideas" in a manner akin to direct "content-based regulation." Ante, at 448, 113 L Ed 2d, at 505.[3]

The majority also mistakenly assesses the impact of Arkansas' discriminatory tax as if the State's 100 cable operators comprised 100 additional actors in a *statewide* information market. In fact, most communities are serviced by only a single cable operator. See generally 1 Gale Directory, supra, at 69-91. Thus, in any given locale, Arkansas' discriminatory tax may disadvantage a *single* actor, a "small" number even under the majority's calculus.

Even more important, the majority's focus on absolute numbers ignores the potential for abuse inher-

3. Even if it did happen to apply neutrally across the range of viewpoints expressed in the Arkansas information market, Arkansas' discriminatory tax would still raise First Amendment problems. "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." Regan v Taxation with Representation of Washington, 461 US 540, 553, 76 L Ed 2d 129, 103 S Ct 1997 (1983) (Blackmun, J., concurring).

ent in the State's power to discriminate based on *medium identity*. So long as the disproportionately taxed medium is sufficiently "large," nothing in the majority's test prevents the State from singling out a particular medium for higher taxes, either because the State does not like the character of the services that the medium provides or because the State simply wishes to confer an advantage upon the medium's competitors.

Indeed, the facts of this case highlight the potential for governmental abuse inherent in the power to discriminate among like-situated media based on their identities. Before this litigation began, most receipts generated by the media—including newspaper sales, certain magazine subscription fees, print and electronic media advertising revenues, and cable television and scrambled-satellite television subscription fees—were either expressly exempted from, or not expressly included in, the Arkansas sales tax. See Ark Code

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Ann §§ 84-1903, 84-1904(f), (j), (1947 and Supp 1985); see also Arkansas Writers' Project, 481 US, at 224-225, 95 L Ed 2d 209, 107 S Ct 1722. Effective July 1, 1987, however, the legislature expanded the tax base to include cable television subscription fees. See App to Pet for Cert in No. 90-38, p 16a. Cable operators then filed this suit, protesting the discriminatory treatment in general and the absence of any tax on scrambled-satellite television—cable's closest rival—in particular. While the case was pending on appeal to the Arkansas Supreme Court, the Arkansas legislature again amended the sales tax, this time extending the tax to the subscription fees paid for scrambled satellite television. 301 Ark, at 484, 785 SW2d, at 203. Of course, for all we know, the legislature's initial decision selectively to tax cable may have been prompted by a similar plea from traditional broadcast media to curtail competition from the emerging cable industry. If the legislature did indeed respond to such importunings, the tax would implicate government censorship as surely as if the government itself disapproved of the new competitors.

As I have noted, however, our precedents do not require "evidence of an improper censorial motive," Arkansas Writers' Project, supra, at 228, 95 L Ed 2d 209, 107 S Ct 1722, before we may find that a discriminatory tax violates the Free Press Clause; it is enough that the application of a tax offers the "*potential* for abuse," Minneapolis Star, 460 US, at 592, 75 L Ed 2d 295, 103 S Ct 1365 (emphasis added). That potential is surely present when the legislature may, at will, include or exclude various media sectors from a general tax.

B

The majority, however, does not flinch at the prospect of intermedia discrimination. Purporting to draw on Regan v Taxation With Representation of Washington, 461 US 540, 76 L Ed 2d 129, 103 S Ct 1997 (1983) —a decision dealing with the tax-deductibility of lobbying expenditures —the majority embraces "the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates *on*

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the basis of ideas." Ante, at 450, 113 L Ed 2d, at 505 (emphasis added). "[T]he power to discriminate in taxation," the majority insists, is "[i]nherent in the power to tax." Ante, at 451, 113 L Ed 2d, at 506.

Read for all they are worth, these propositions would essentially annihilate the nondiscrimination principle, at least as it applies to tax differentials between individual members of the press. If Minneapolis Star, Arkansas Writers' Project, and Grosjean stand for anything, it is that the "power to tax" does *not* include "the power to discriminate" when the press is involved. Nor is it the case under these decisions that a tax regime that singles out individual members of the press implicates the First Amendment *only* when it is "directed at, or presents the danger of suppressing, *particular* ideas." Ante, at 453, 113 L Ed 2d, at 507-508 (emphasis added). Even when structured in a manner that is content neutral, a scheme that imposes differential burdens on like-situated members of the press violates the First Amendment because it poses *the risk* that the State might abuse this power. See Minneapolis Star, supra, at 592, 75 L Ed 2d 295, 103 S Ct 1365.

At a minimum, the majority incorrectly conflates our cases on selective taxation of the press and our cases on the selective taxation (or subsidization) of speech generally. Regan holds that the government does not invariably violate the Free Speech Clause when it selectively subsidizes one group of speakers according to content-neutral criteria. This power, when exercised with appropriate restraint, inheres in government's legitimate authority to tap the energy of expressive activity to promote the public welfare. See Buckley v Valeo, 424 US 1, 90-97, 46 L Ed 2d 659, 96 S Ct 612 (1976).

But our cases on the selective taxation of the *press* strike a different posture. Although the Free Press Clause does not guarantee the press a preferred position over other speakers, the Free Press Clause does "protec[t] [members of press] from invidious discrimination." L. Tribe, American Constitutional Law § 12-20, p 963 (2d ed 1988). Selective taxation is precisely that. In light of the Framers' specific intent

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"to preserve an untrammeled press as a vital source of public information," Grosjean, 297 US, at 250, 80 L Ed 660, 56 S Ct 444; see Minneapolis Star, supra, at 585, n 7, 75 L Ed 2d 295, 103 S Ct 1365, our precedents recognize that the Free Press Clause imposes a special obligation on government to avoid disrupting the integrity of the information market. As Justice Stewart explained:

> "[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution." Stewart, "Or of the Press," 26 Hastings LJ 631, 633 (1975) (emphasis in original.)

Because they distort the competitive forces that animate this institution, tax differentials that fail to correspond to the social cost associated with different information media, and that are justified by nothing more than the State's desire for revenue, violate government's obligation of evenhandedness. Clearly, this is true of disproportionate taxation of cable television. Under the First Amendment, government simply has no business interfering with the pro-

cess by which citizens' preferences for information formats evolve.[4]

Today's decision unwisely discards these teachings. I dissent.

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4. The majority's reliance on Mabee v White Plains Publishing Co. 327 US 178, 90 L Ed 607, 66 S Ct 511 (1946), and Oklahoma Press Publishing Co. v Walling, 327 US 186, 90 L Ed 614, 66 S Ct 494, 166 ALR 531 (1946), is also misplaced. At issue in those cases was a provision that exempted small newspapers with primarily local distribution from the Fair Labor Standards Act of 1938 (FLSA). In upholding the provision, the Court noted that the exemption promoted a legitimate interest in placing the exempted papers "on a parity with other small town enterprises" that also were not subject to regulation under the FLSA. Mabee, supra, at 184, 90 L Ed 607, 66 S Ct 511; see also Oklahoma Press, supra, at 194, 90 L Ed 614, 66 S Ct 494, 166 ALR 531. In Minneapolis Star, we distinguished these cases on the ground that, unlike the FLSA exemption, Minnesota's discrimination between large and small newspapers did not derive from, or correspond to, any *general* state policy to benefit small businesses. See 460 US, at 592, and n 16, 75 L Ed 2d 295, 103 S Ct 1365. Similarly, Arkansas' discrimination against cable operators derives not from any general, legitimate state policy unrelated to speech but rather from the simple decision of state officials to treat one information medium differently from all others. Thus, like the schemes in Arkansas Writers' Project and Minneapolis Star, but unlike the scheme at issue in Mabee and Oklahoma Press, the Arkansas tax scheme must be supported by a compelling interest to survive First Amendment scrutiny. Cf. United States v O'Brien, 391 US 367, 377, 20 L Ed 2d 672, 88 S Ct 1673 (1968).

[499 US 467]

WARREN McCLESKEY, Petitioner

v

WALTER D. ZANT, Superintendent, Georgia Diagnostic & Classification Center

499 US 467, 113 L Ed 2d 517, 111 S Ct 1454

[No. 89-7024]

Argued October 31, 1990. Decided April 16, 1991.

Decision: Federal habeas corpus petitioner held to have abused writ in claiming that admission of informant's testimony at Georgia trial violated right to counsel, where claim was not raised in prior federal petition.

SUMMARY

Under 28 USCS § 2244(b) and under Rule 9(b) of the Rules Governing § 2254 Cases, the abuse of the writ doctrine defines the circumstances which prohibit a federal habeas corpus petitioner from raising a claim which the petitioner failed to raise in a prior federal habeas corpus petition. In a 1978 criminal trial in the Superior Court of Fulton County, Georgia, the prosecution, in order to rebut an accused's testimony denying all involvement in the alleged murder of an off-duty policeman during a robbery, called an informant who (1) had occupied a jail cell next to the accused; and (2) testified that the accused had admitted shooting the policeman. The accused was convicted of murder and sentenced to death and, after the accused was unsuccessful on direct review, the accused, in January 1981, (1) filed a petition for state habeas corpus relief in the Superior Court of Butts County, Georgia; and (2) asserted numerous claims, including a claim that the admission of the informant's testimony—reciting statements from a situation allegedly created to induce the accused to make incriminating statements without the assistance of counsel—had violated the accused's right to counsel under the Federal Constitution's Sixth Amendment, as construed in Massiah v United States (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199. The state court, however, denied relief; the Georgia Supreme Court denied the accused's application for a certificate of probable cause; and the United States Supreme Court denied certiorari (454 US 1093, 70 L Ed 2d 631, 102 S Ct 659). The accused then, in December 1981, (1) filed a habeas corpus

Briefs of Counsel, p 804, infra.

petition in the United States District Court for the Northern District of Georgia; (2) asserted 18 claims, not including the Massiah claim; and (3) was ultimately unsuccessful. After the accused's second state habeas corpus action—which likewise did not include a Massiah claim—was also unsuccessful, the accused, in 1987, filed in the District Court a second federal habeas corpus petition which included a Massiah claim supposedly based on a 21-page signed statement by the informant, which statement (1) had been made in 1978, 2 weeks before the accused's murder trial had begun, (2) had been furnished by the police to the accused 1 month before the second federal petition had been filed; and (3) reported incriminating jailhouse conversations by the accused allegedly conducted with, or overheard by, the informant. After the District Court held hearings which supposedly disclosed the identity of a jailer whose testimony allegedly supported a contention that the police had used the informant to obtain incriminating statements from the accused, the District Court, in ordering relief based upon a Massiah violation, rejected the state's argument that the accused's assertion of the Massiah claim constituted an abuse of the writ. On appeal, the Court of Appeals, in reversing, expressed the view that the District Court had abused its discretion by failing to dismiss the accused's Massiah claim as an abuse of the writ (890 F2d 342).

On certiorari, the United States Supreme Court affirmed. In an opinion by KENNEDY, J., joined by REHNQUIST, Ch. J., and WHITE, O'CONNOR, SCALIA, and SOUTER, JJ., it was held that (1) a cause and prejudice standard is to be applied, under § 2244(b) and under Rule 9(b), in order to determine if a petitioner has abused the writ in a second or subsequent federal habeas corpus petition through inexcusable neglect in failing to raise a claim in a prior federal petition, because (a) the unity of structure and purpose in the doctrines of state procedural default and of abuse of the writ means that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts, (b) although the cause and prejudice standard differs from some language in one prior United States Supreme Court decision, the standard is consistent with numerous other decisions, (c) the standard's exception for fundamental miscarriages of justice gives meaningful content to the abuse of the writ doctrine's otherwise unexplained "ends of justice" inquiry, (d) considerations of certainty and stability support adoption of the standard, and (e) adoption of the standard acknowledges the historic purpose and function of the writ and, by preventing the writ's abuse, assures the writ's continued efficacy; and (2) under such a standard, the accused's Massiah claim constituted an abuse of the writ, because (a) under the circumstances, the accused did not have the necessary cause, where, even if the accused did not know about or could not have discovered the informant's 21-page statement prior to filing the first federal petition, the accused knew about or could have discovered the supposed jail cell conversations that the statement recounted, (b) since the accused lacked such cause, there was no need to consider whether the accused would have been prejudiced by his inability to raise the alleged Massiah violation at such a late date, and (c) the narrow cause exception for the exercise of equitable discretion to correct a miscarriage of justice was of no avail to the

accused, for even if there had been a Massiah violation, the violation had resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination.

MARSHALL, J., joined by BLACKMUN and STEVENS, JJ., dissenting, expressed the view that (1) the court's radical redefinition of the content of the abuse of the writ doctrine, through the substitution of a strict-liability standard of cause and prejudice for the prior good-faith standard of deliberate abandonment, (a) repudiated a line of judicial decisions codified by Congress in the governing statute and procedural rules, (b) was by no means foreseeable when the accused had filed his first federal habeas corpus application, and (c) announced and applied a new rule which had not even been requested by the party opposing the accused at any point in the litigation; and (2) the court, rather than remanding the case for reconsideration in light of the new standard, had performed an independent reconstruction of the record, which reconstruction (a) disregarded the factual findings of the District Court, and (b) applied the new rule in a manner that encouraged state officials to conceal evidence which would likely prompt an accused to raise a particular claim on federal habeas corpus.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Habeas Corpus §§ 37, 113; Statutes § 139 — abuse of writ — failure to raise claim in prior federal petition — cause and prejudice standard — default in state court

1a-1f. A cause and prejudice standard is to be applied, under 28 USCS § 2244(b) and under Rule 9(b) of the Rules Governing § 2254 Cases, in

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39 Am Jur 2d, Habeas Corpus §§ 17, 53, 62, 160

16 Federal Procedure, L Ed, Habeas Corpus §§ 41:39, 41:73, 41:169, 41:205, 41:335-41:337

39 Am Jur Trials 157, Historical Aspects and Procedural Limitations of Federal Habeas Corpus

28 USCS § 2244(b); USCS Court Rules, § 2254 Rules, Rule 9(b)

L Ed Digest, Habeas Corpus §§ 26, 27, 37, 113

L Ed Index, Attorneys at Law; Habeas Corpus; Informers

Index to Annotations, Attorney or Assistance of Attorney; Habeas Corpus; Informers

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ANNOTATION REFERENCES

Requirement, in federal habeas corpus proceedings, of showing of "cause" and "prejudice" with respect to procedural default in state criminal proceedings—Supreme Court cases. 91 L Ed 2d 676.

Law enforcement officers' use of informant as violating accused's right to counsel under Federal Constitution's Sixth Amendment—Supreme Court cases. 91 L Ed 2d 665.

Prosecutor's duty, under due process clause of Federal Constitution, to disclose evidence favorable to accused—Supreme Court cases. 87 L Ed 2d 802.

United States Supreme Court's views as to retroactive effect of its own decisions announcing new rules. 65 L Ed 2d 1219.

Accused's right to counsel under the Federal Constitution—Supreme Court cases. 93 L Ed 137, 2 L Ed 2d 1644, 9 L Ed 2d 1260, 18 L Ed 2d 1420.

Necessity of hearing in federal habeas corpus proceedings challenging validity of conviction of crime—Supreme Court cases. 9 L Ed 2d 1246.

Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus. 60 ALR Fed 481.

order to determine if a petitioner has abused the writ in a second or subsequent federal habeas corpus petition through inexcusable neglect in failing to raise a claim in a prior federal habeas corpus petition—so that the federal courts will decline to entertain the claim in such a second or subsequent federal petition—because (1) the unity of structure and purpose in the doctrines of state procedural default and of abuse of the writ means that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts, where (a) given that the federal writ overrides cost-of-review considerations—essential as they are to the rule of law—when a petitioner raises a meritorious constitutional claim in a proper manner, both procedural default jurisprudence and abuse of the writ jurisprudence help define this dimension of procedural regularity, as both doctrines (i) impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones, (ii) recognize the law's interest in finality, and (iii) invoke equitable principles to define a court's discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence, and (b) while the concern to honor state procedural defaults rests in part on respect for the integrity of the procedures imposed by a coordinate jurisdiction within the federal system, which respect is not implicated when a petitioner defaults a claim when failing to raise it in a first round of federal review, both the procedural default and abuse of the writ doctrines are designed (i) to lessen the injury to a state that results through re-examination of a state conviction on a ground that the state did not have the opportunity to address at a prior, appropriate time, and (ii) to vindicate the state's interest in the finality of the state's criminal judgments; (2) although the cause and prejudice standard differs from some language in one prior United States Supreme Court decision, the standard is consistent with numerous other decisions; (3) the standard's exception for fundamental miscarriages of justice gives meaningful content to the otherwise unexplained "ends of justice" inquiry, which remains appropriate despite the elimination of any reference to such inquiry in the 1966 revision to § 2244; (4) considerations of certainty and stability support adoption of the standard, which (a) is well defined in the case law, (b) will be familiar to federal courts, (c) clarifies the imprecise contours of the term "inexcusable neglect," (d) is an objective standard, (e) can be applied in a manner that comports with the threshold nature of the abuse of the writ inquiry, and (f) provides a sound and workable means of channeling the discretion of federal habeas courts; and (5) in light of the abusive petitions that have threatened to undermine the integrity of the habeas corpus process—even in capital cases—adoption of the standard (a) acknowledges the historic purpose and function of the writ in the nation's constitutional system, and (b) by preventing the writ's abuse, assures the writ's continued efficacy. (Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Habeas Corpus §§ 26, 27, 113 — right to counsel — failure to raise claim in prior federal petition — abuse of writ — claim in prior state petition

2a-2d. With respect to a petitioner's claim, in a second federal habeas corpus petition filed in 1987, that the admission at the petitioner's 1978 state criminal trial of a prison informant's testimony as to incriminating statements allegedly made by the petitioner violated the petitioner's right to counsel under the Federal Constitution's Sixth Amendment as construed in Massiah v United States (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199—which Massiah claim was raised by the petitioner in an unsuccessful state habeas corpus proceeding begun in January 1981, but not in the petitioner's first federal habeas corpus petition filed in December 1981—the Massiah claim constitutes an abuse of the writ under 28 USCS § 2244(b) and under Rule 9(b) of the Rules Governing § 2254 Cases, so that a ruling on the merits of the claim cannot come before a federal court on habeas corpus, because, even if the petitioner did not learn of a 21-page signed statement made by the informant until 1 month before filing his second federal petition, and even if the petitioner did not learn of the identity of an allegedly crucial jailer until the hearing on the second petition, (1) under the circumstances, the petitioner did not have cause for failing to raise the Massiah claim in the first petition; (2) since the petitioner lacked such cause, there is no need to consider whether the petitioner would have been prejudiced by his inability to raise the alleged Massiah violation at such a late date; and (3) the narrow cause exception for the exercise of equitable discretion to correct a miscarriage of justice is of no avail to the petitioner, for even if there was a Massiah violation, the violation resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination, where the 21-page statement which the petitioner seeks to embrace confirms his guilt. (Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Habeas Corpus §§ 17, 47 — federal inquiry — constitutional claims

3. With the exception of claims of violations of the Federal Constitution's Fourth Amendment where a federal habeas corpus petitioner has been given a full and fair opportunity to litigate such claims in state court, the writ of habeas corpus appears to extend to all dispositive constitutional claims presented in a proper procedural manner.

Habeas Corpus §§ 14.5, 37, 113 — abuse of writ — failure to raise claim — prior federal petition — state court — nonexhaustion

4a-4e. One procedural requisite for federal habeas corpus review is that a petition not lead to an abuse of the writ; abuse of the writ doctrine generally prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in a prior federal habeas proceeding; 28 USCS § 2244(b), as added by Congress in 1966, establishes a qualified application of the doctrine of res judicata by providing that a federal court need not entertain a second or subsequent habeas petition unless (1) the subsequent petition alleges a new ground, factual or otherwise, and (2) the petitioner satisfies a

judge that the petitioner did not deliberately withhold the ground earlier or otherwise abuse the writ; if the petitioner meets these two conditions, the federal court must consider the subsequent petition as long as other habeas errors—such as nonexhaustion or procedural default—are not present; like § 2244(b), Rule 9(b) of the Rules Governing § 2254 Cases, promulgated in 1976, incorporates the judge-made principle governing abuse of the writ, as set forth in Sanders v United States (1963) 373 US 1, 10 L Ed 2d 148, 83 S Ct 1068; a federal habeas corpus petitioner, in addition to instances of deliberate abandonment, may abuse the writ by failing to raise the claim through inexcusable neglect, under a standard which demands more than the standard for deliberate abandonment, because a petitioner, under the inexcusable neglect standard, can abuse the writ by raising a claim in a subsequent petition that the petitioner could have raised in the first, regardless of whether the failure to raise the claim earlier stemmed from a deliberate choice. (Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

Courts § 777.5; Criminal Law § 46.4; Habeas Corpus §§ 37, 111, 113 — abuse of writ — pleading — dismissal — failure to raise claim — prior federal petition — state court — retroactivity — right to counsel

5a, 5b. There is a presumption against federal habeas corpus adjudication both of claims defaulted in the first round of federal habeas and of claims defaulted in state court, where the doctrinal terms "abuse of the writ" and "inexcusable neglect" on the one hand, and "procedural default" on the other—which terms have been used to describe restrictions on the use of habeas corpus—imply a background norm of procedural regularity binding on the petitioner; under 28 USCS § 2244(b) and under Rule 9(b) of the Rules Governing § 2254 Cases, the cause and prejudice standard for cases of state-court procedural default applies to an abuse of the writ inquiry in the following manner—(1) when a petitioner files a second or subsequent federal application, the government bears the burden of pleading abuse of the writ, (2) the government satisfies this burden if the government, with clarity and particularity, (a) notes the petitioner's prior writ history, (b) identifies the claims that appear for the first time, and (c) alleges that the petitioner has abused the writ, (3) the burden to disprove abuse then becomes the petitioner's, (4) the petitioner, in order to excuse a failure to raise a claim earlier, must show cause for failing to raise the claim and prejudice therefrom, as those concepts have been defined in the United States Supreme Court's procedural default decisions, (5) a petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if a Federal District Court determines as a matter of law that the petitioner cannot satisfy this standard, and (6) if the petitioner cannot show cause, the failure to raise the claim earlier may nonetheless be excused if the petitioner can show that a fundamental miscarriage of justice would result from a failure to entertain the claim; application of the cause and prejudice standard in the abuse of the writ context does not (1) mitigate the force of the general prohibition, with

certain exceptions, against the retroactive application of new law to claims raised in federal habeas corpus, or (2) imply that there is a federal constitutional right to counsel in federal habeas corpus. (Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

Equity § 87; Habeas Corpus § 1 — principles

6. In federal habeas corpus cases, equity recognizes that a suitor's conduct in relation to the matter at hand may disentitle the suitor from the relief that the suitor seeks.

Habeas Corpus § 37 — procedural default — state court

7. In federal habeas corpus cases which involve a prior procedural default in state court, the cause standard for excusing such default requires the petitioner to show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court; objective factors that constitute cause include (1) interference by officials that makes compliance with the state's procedural rule impracticable, (2) a showing that the factual or legal basis for a claim was not reasonably available to counsel, or (3) constitutionally ineffective assistance of counsel; attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse such a procedural default; once a federal habeas corpus petitioner has established cause, the petitioner must show actual prejudice resulting from the errors of which the petitioner complains; federal courts retain the authority to issue the writ of habeas corpus, despite a petitioner's failure to show such cause for a procedural default, in a further, narrow class of cases—those extraordinary instances when a federal constitutional violation probably has caused the conviction of one innocent of the crime—which cases have been described as implicating a fundamental miscarriage of justice.

Habeas Corpus §§ 26, 27, 113 — abuse of writ — failure to raise claim in prior federal petition — cause — claim in prior state petition

8a-8f. For purposes of abuse of the writ doctrine under 28 USCS § 2244(b) and under Rule 9(b) of the Rules Governing § 2254 Cases, a petitioner who files a second federal habeas corpus petition in 1987 has failed to demonstrate cause for his failure to include in his first, December 1981, federal petition a claim that the admission at the petitioner's 1978 state criminal trial of a prison informant's testimony as to incriminating statements allegedly made by the petitioner violated the petitioner's right to counsel under the Federal Constitution's Sixth Amendment, as construed in Massiah v United States (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199—which Massiah claim was raised by the petitioner in an unsuccessful state habeas corpus proceeding begun in January 1981—because (1) with respect to a 21-page signed statement—which had been made by the informant 2 weeks before the 1978 trial began, had been furnished by the police to the petitioner 1 month before his filing of the second federal petition, and had reported incriminating jailhouse conversations by the petitioner allegedly conducted with, or overheard by, the informant—even if the petitioner did not know about or could not have discovered the 21-page statement prior to filing the first federal peti-

tion, the petitioner knew about or could have discovered the supposed conversations that the statement recounted, for (a) knowledge of the facts based upon the testimony and questioning at trial would have put the petitioner on notice to pursue the Massiah claim in his first federal petition as he did in the state petition, (b) since the petitioner supposedly participated in the conversations in question, the petitioner knew everything in the statement that was relied upon to establish for Massiah purposes a connection between the informant and the police, and (c) the petitioner cannot contend that his false representations at trial constitute the requisite cause; (2) even if the identity and testimony of a particular jailer could not have been known prior to filing the first federal petition—where the jailer's identity was supposedly disclosed at a Federal District Court's hearings on the second federal petition, and where the jailer's testimony at those hearings allegedly supported a contention that the police had used the informant to obtain incriminating statements from the petitioner—(a) under the petitioner's own theory, nothing was known about the jailer at the time of filing the second petition, and (b) if the petitioner did not need to know about the jailer to press the Massiah claim in the second petition, the petitioner did not need to know in order to press the claim in the first petition; (3) critical facts for the Massiah claim, including the reason for the informant's placement in a cell adjacent to the petitioner's and the precise conversation that each officer had with the informant before he was put there, could have been reconstructed with greater precision if the petitioner had raised the claim in 1981; and (4) the petitioner's argument that the state wrongfully withheld the 21-page statement is not presented in the case, where (a) the police turned over the statement upon request in 1987, (b) the District Court found that there was no wrongful conduct by the state in failing to hand over the statement earlier, (c) the relevant question is whether the petitioner knew or should have known of the contents of the supposed conversations recounted in the statement, and (d) at least four courts considered and rejected the petitioner's claim that the prosecution's failure to disclose the informant's testimony before he took the stand at the 1978 trial denied the petitioner a fair trial under Brady v Maryland (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. (Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Habeas Corpus § 113 — abuse of writ — failure to raise claim in prior petition — cause for excuse

9. The fact that a federal habeas corpus petitioner does not possess or could not reasonably have obtained certain evidence fails to establish the cause necessary to excuse a failure to raise a claim in a prior federal habeas corpus petition, for purposes of the abuse of the writ doctrine under 28 USCS § 2244(b) and under Rule 9(b) of the Rules Governing § 2254 Cases, if other known or discoverable evidence could have supported the claim in any event; for cause to exist, some external impediment, whether government interference or the reasonable unavailability of the factual basis for the claim, must have prevented the petitioner from constructing or raising the claim; the abuse of the writ

doctrine examines the petitioner's conduct, so that the question is whether a petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege the claim in the first petition and to pursue the matter through the habeas process; in the abuse of the writ context, the requirement of cause is based on the principle that the petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition; if what a petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, (1) what the petitioner does not know is irrelevant, and (2) omission of a claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim. (Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

Appeal §§ 1321, 1474 — habeas corpus — finding of court — acceptance — scope of review

10a, 10b. On certiorari to review whether, under 28 USCS § 2244(b) and under Rule 9(b) of the Rules Governing § 2254 Cases, a federal habeas corpus petitioner abused the writ in raising a claim which he failed to raise in a prior federal habeas corpus petition—which claim is that the admission at the petitioner's state criminal trial of a prison informant's testimony as to incriminating statements allegedly made by the petitioner violated the petitioner's right to counsel under the Federal Constitution's Sixth Amendment, as construed in Massiah v United States (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199—even though the record furnishes strong evidence that the petitioner knew or should have known of a particular 21-page signed statement made by the informant before the first federal petition and chose not to pursue that statement, the United States Supreme Court (1) will accept as not clearly erroneous a Federal District Court's finding that the statement was not known or reasonably discoverable at the time of the first federal petition; but (2) need not pass upon the District Court's finding, for the relevant question in the case is whether the petitioner knew or should have known of the contents of the supposed conversations recounted by the informant in the statement. (Marshall, Blackmun, and Stevens, JJ., dissented in part from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

To rebut petitioner McCleskey's alibi defense at his 1978 Georgia trial for murder and a related crime, the State called Offie Evans, the occupant of the jail cell next to McCleskey's, who testified that McCleskey had admitted and boasted about the killing. On the basis of this and other evidence supporting McCleskey's guilt, the jury convicted him and sentenced him to death. After the State Supreme Court affirmed, he filed an unsuccessful petition for state habeas corpus relief, alleging, inter alia, that his statements to Evans were elicited in a situation created by the State to induce him to make incriminating statements without the assistance of counsel in violation of Massiah v United States, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199. He then filed his first federal

habeas petition, which did not raise a Massiah claim, and a second state petition, both of which were ultimately unsuccessful. Finally, he filed his second federal habeas petition in 1987, basing a Massiah challenge on a 21-page statement that Evans had made to police two weeks before the trial. The document, which the State furnished at McCleskey's request shortly before he filed his second federal petition, related conversations that were consistent with Evans' trial testimony, but also recounted the tactics used by Evans to engage McCleskey in conversation. Moreover, at a hearing on the petition, Ulysses Worthy, a jailer during McCleskey's pretrial incarceration whose identity came to light after the petition was filed, gave testimony indicating that Evans' cell assignment had been made at the State's behest. In light of the Evans statement and Worthy's testimony, the District Court found an ab initio relationship between Evans and the State and granted McCleskey relief under Massiah. The Court of Appeals reversed on the basis of the doctrine of abuse of the writ, which defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent habeas corpus petition.

Held: McCleskey's failure to raise his Massiah claim in his first federal habeas petition constituted abuse of the writ.

(a) Much confusion exists as to the proper standard for applying the abuse-of-the-writ doctrine, which refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. This Court has heretofore defined such abuse in an oblique way, through dicta and denials of certiorari petitions or stay applications, see Witt v Wainwright, 470 US 1039, 1043, 84 L Ed 2d 801, 105 S Ct 1415 (Marshall, J., dissenting), and, because of historical changes and the complexity of the subject, has not always followed an unwavering line in its conclusions as to the writ's availability, Fay v Noia, 372 US 391, 411-412, 9 L Ed 2d 837, 83 S Ct 822.

(b) Although this Court's federal habeas decisions do not all admit of ready synthesis, a review of these precedents demonstrates that a claim need not have been deliberately abandoned in an earlier petition in order to establish that its inclusion in a subsequent petition constitutes abuse of the writ, see, e.g., Sanders v United States, 373 US 1, 18, 10 L Ed 2d 148, 83 S Ct 1068; that such inclusion constitutes abuse if the claim could have been raised in the first petition, but was omitted through inexcusable neglect, see, e.g., Delo v Stokes, 495 US 320, 321-322, 109 L Ed 2d 325, 110 S Ct 1880; and that, because the doctrines of procedural default and abuse of the writ implicate nearly identical concerns, the determination of inexcusable neglect in the abuse context should be governed by the same standard used to determine whether to excuse a habeas petitioner's state procedural defaults, see, e.g., Wainwright v Sykes, 433 US 72, 53 L Ed 2d 594, 97 S Ct 2497. Thus, when a prisoner files a second or subsequent habeas petition, the government bears the burden of pleading abuse of the writ. This burden is satisfied if the government, with clarity and particularity, notes petitioner's prior writ history, identifies the claims that appear for the first time, and

alleges that petitioner has abused the writ. The burden to disprove abuse then shifts to petitioner. To excuse his failure to raise the claim earlier, he must show cause—e.g., that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim—as well as actual prejudice resulting from the errors of which he complains. He will not be entitled to an evidentiary hearing if the district court determines as a matter of law that he cannot satisfy the cause and prejudice standard. However, if he cannot show cause, the failure to earlier raise the claim may nonetheless be excused if he can show that a fundamental miscarriage of justice—the conviction of an innocent person—would result from a failure to entertain the claim.

(c) McCleskey has not satisfied the foregoing standard for excusing the omission of his Massiah claim from his first federal habeas petition. He lacks cause for that omission, and, therefore, the question whether he would be prejudiced by his inability to raise the claim need not be considered. See Murray v Carrier, 477 US 478, 494, 91 L Ed 2d 397, 106 S Ct 2639. That he may not have known about, or been able to discover, the Evans document before filing his first federal petition does not establish cause, since knowledge gleaned from the trial about the jail-cell conversations and Evans' conduct, as well as McCleskey's admitted participation in those conversations, put him on notice that he should pursue the Massiah claim in the first federal petition as he had done in his first state petition. Nor does the unavailability of Worthy's identity and testimony at the time of the first federal petition establish cause, since the fact that Evans' statement was the only new evidence McCleskey had when he filed the Massiah claim in his second federal petition demonstrates the irrelevance of Worthy to that claim. Moreover, cause cannot be established by the State's allegedly wrongful concealment of the Evans document until 1987, since the District Court found no wrongdoing in the failure to hand over the document earlier, and since any initial concealment would not have prevented McCleskey from raising a Massiah claim in the first federal petition. Amadeo v Zant, 486 US 214, 224, 100 L Ed 2d 249, 108 S Ct 1771, distinguished. Furthermore, the narrow miscarriage of justice exception to the cause requirement is of no avail to McCleskey, since he cannot demonstrate that the alleged Massiah violation caused the conviction of an innocent person. The record demonstrates that that violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. In fact, the Evans statement that McCleskey now embraces confirms his guilt.

890 F2d 342, affirmed.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, O'Connor, Scalia, and Souter, JJ., joined. Marshall, J., filed a dissenting opinion, in which Blackmun and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

John Charles Boger argued the cause for petitioner.
Mary Beth Westmoreland argued the cause for respondent.
Briefs of Counsel, p 804, infra.

OPINION OF THE COURT

[499 US 470]

Justice **Kennedy** delivered the opinion of the Court.

[1a, 2a] The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus. Petitioner Warren McCleskey in a second federal habeas petition presented a claim under Massiah v United States, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199 (1964), that he failed to include in his first federal petition. The Court of Appeals for the Eleventh Circuit held that assertion of the Massiah claim in this manner abused the writ. Though our analysis differs from that of the Court of Appeals, we agree that the petitioner here abused the writ, and we affirm the judgment.

I

McCleskey and three other men, all armed, robbed a Georgia furniture store in 1978. One of the robbers shot and killed an off duty policeman who entered the store in the midst of the crime. McCleskey confessed to the police that he participated in the robbery. When on trial for both the robbery and the murder, however, McCleskey renounced his confession after taking the stand with an alibi denying all involvement. To rebut McCleskey's testimony, the prosecution called Offie Evans, who had occupied a jail cell next to McCleskey's. Evans testified that McCleskey admitted shooting the officer during the robbery and boasted that he would have shot his way out of the store even in the face of a dozen policemen.

Although no one witnessed the shooting, further direct and circumstantial evidence supported McCleskey's guilt of the murder. An eyewitness testified that someone ran from the store carrying a pearl-handled pistol soon after the robbery. Other witnesses testified that McCleskey earlier had stolen a pearl-handled pistol of the same caliber as the bullet that killed the officer. Ben Wright, one of McCleskey's accomplices, confirmed that during the crime McCleskey carried a white-handled handgun matching the caliber of the fatal bullet.

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Wright also testified that McCleskey admitted shooting the officer. Finally, the prosecutor introduced McCleskey's confession of participation in the robbery.

In December 1978, the jury convicted McCleskey of murder and sentenced him to death. Since his conviction, McCleskey has pursued direct and collateral remedies for more than a decade. We describe this procedural history in detail, both for a proper understanding of the case and as an illustration of the context in which allegations of abuse of the writ arise.

On direct appeal to the Supreme Court of Georgia, McCleskey raised six grounds of error. A summary of McCleskey's claims on direct appeal, as well as those he asserted in each of his four collateral proceedings, is

set forth in the Appendix to this opinion, infra, at 503, 113 L Ed 2d, at 551. The portion of the appeal relevant for our purposes involves McCleskey's attack on Evans' rebuttal testimony. McCleskey contended that the trial court "erred in allowing evidence of [McCleskey's] oral statement admitting the murder made to [Evans] in the next cell, because the prosecutor had deliberately withheld such statement" in violation of Brady v Maryland, 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963). McCleskey v State, 245 Ga 108, 112, 263 SE2d 146, 149 (1980). A unanimous Georgia Supreme Court acknowledged that the prosecutor did not furnish Evans' statement to the defense, but ruled that because the undisclosed evidence was not exculpatory, McCleskey suffered no material prejudice and was not denied a fair trial under Brady. 245 Ga, at 112-113, 263 SE2d, at 149. The court noted, moreover, that the evidence McCleskey wanted to inspect was "introduced to the jury in its entirety" through Evans' testimony, and that McCleskey's argument that "the evidence was needed in order to prepare a proper defense or impeach other witnesses ha[d] no merit because the evidence requested was statements made by [McCleskey] himself." Ibid. The court rejected McCleskey's other contentions and

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affirmed his conviction and sentence. Ibid. We denied certiorari. McCleskey v Georgia, 449 US 891, 66 L Ed 2d 119, 101 S Ct 253 (1980).

McCleskey then initiated postconviction proceedings. In January 1981, he filed a petition for state habeas corpus relief. The amended petition raised 23 challenges to his murder conviction and death sentence. See Appendix, infra, at 503, 113 L Ed 2d, at 551. Three of the claims concerned Evans' testimony. First, McCleskey contended that the State violated his due process rights under Giglio v United States, 405 US 150, 31 L Ed 2d 104, 92 S Ct 763 (1972), by its failure to disclose an agreement to drop pending escape charges against Evans in return for his cooperation and testimony. App 20. Second, McCleskey reasserted his Brady claim that the State violated his due process rights by the deliberate withholding of the statement he made to Evans while in jail. App 21. Third, McCleskey alleged that admission of Evans' testimony violated the Sixth Amendment right to counsel as construed in Massiah v United States, supra. On this theory, "[t]he introduction into evidence of [his] statements to [Evans], elicited in a situation created to induce [McCleskey] to make incriminating statements without the assistance of counsel, violated [McCleskey's] right to counsel under the Sixth Amendment to the Constitution of the United States." App 22.

At the state habeas corpus hearing, Evans testified that one of the detectives investigating the murder agreed to speak a word on his behalf to the federal authorities about certain federal charges pending against him. The state habeas court ruled that the ex parte recommendation did not implicate Giglio, and it denied relief on all other claims. The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause, and we denied his second petition for a writ of certiorari. McCleskey v Zant, 454 US 1093, 70 L Ed 2d 631, 102 S Ct 659 (1981).

In December 1981, McCleskey filed his first federal habeas corpus petition in the United States District

Court for the Northern District of Georgia, asserting 18 grounds for relief.

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See Appendix, infra, at 504-505, 113 L Ed 2d, at 551-552. The petition failed to allege the Massiah claim, but it did reassert the Giglio and Brady claims. Following extensive hearings in August and October 1983, the District Court held that the detective's statement to Evans was a promise of favorable treatment, and that failure to disclose the promise violated Giglio. McCleskey v Zant, 580 F Supp 338, 380-384 (ND Ga 1984). The District Court further held that Evans' trial testimony may have affected the jury's verdict on the charge of malice murder. On these premises it granted relief. Id., at 384.

The Court of Appeals reversed the District Court's grant of the writ. McCleskey v Kemp, 753 F2d 877 (CA11 1985). The court held that the State had not made a promise to Evans of the kind contemplated by Giglio, and that in any event the Giglio error would be harmless. 753 F2d, at 884-885. The court affirmed the District Court on all other grounds. We granted certiorari limited to the question whether Georgia's capital sentencing procedures were constitutional, and denied relief. McCleskey v Kemp, 481 US 279, 95 L Ed 2d 262, 107 S Ct 1756 (1987).

McCleskey continued his postconviction attacks by filing a second state habeas corpus action in 1987 which, as amended, contained five claims for relief. See Appendix, infra, at 505, 113 L Ed 2d, at 552. One of the claims again centered on Evans' testimony, alleging that the State had an agreement with Evans that it had failed to disclose. The state trial court held a hearing and dismissed the petition. The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause.

In July 1987, McCleskey filed a second federal habeas action, the one we now review. In the District Court, McCleskey asserted seven claims, including a Massiah challenge to the introduction of Evans' testimony. See Appendix, infra, at 506, 113 L Ed 2d, at 552. McCleskey had presented a Massiah claim, it will be recalled, in his first state habeas action when he alleged that the conversation recounted by Evans at trial had been "elicited

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in a situation created to induce" him to make an incriminating statement without the assistance of counsel. The first federal petition did not present a Massiah claim. The proffered basis for the Massiah claim in the second federal petition was a 21-page signed statement that Evans made to the Atlanta Police Department on August 1, 1978, two weeks before the trial began. The department furnished the document to McCleskey one month before he filed his second federal petition.

The statement related pretrial jailhouse conversations that Evans had with McCleskey and that Evans overheard between McCleskey and Bernard Dupree. By the statement's own terms, McCleskey participated in all the reported jailcell conversations. Consistent with Evans' testimony at trial, the statement reports McCleskey admitting and boasting about the murder. It also recounts that Evans posed as Ben Wright's uncle and told McCleskey he had talked with Wright about the robbery and the murder.

In his second federal habeas petition, McCleskey asserted that the statement proved Evans "was acting in direct concert with State officials" during the incriminating conversa-

tions with McCleskey, and that the authorities "deliberately elicited" inculpatory admissions in violation of McCleskey's Sixth Amendment right to counsel. Massiah v United States, 377 US, at 206, 12 L Ed 246, 84 S Ct 1199. 1 Tr Exh 1, pp 11-12. Among other responses, the State of Georgia contended that McCleskey's presentation of a Massiah claim for the first time in the second federal petition was an abuse of the writ. 28 USC § 2244(b) [28 USCS § 2244(b)]; Rule 9(b) of the Rules Governing § 2254 Cases.

The District Court held extensive hearings in July and August 1987 focusing on the arrangement the jailers had made for Evans' cell assignment in 1978. Several witnesses denied that Evans had been placed next to McCleskey by design or instructed to overhear conversations or obtain statements from McCleskey. McCleskey's key witness was Ulysses

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Worthy, a jailer at the Fulton County Jail during the summer of 1978. McCleskey's lawyers contacted Worthy after a detective testified that the 1978 Evans statement was taken in Worthy's office. The District Court characterized Worthy's testimony as "often confused and self-contradictory." McCleskey v Kemp, No. C87-1517A (ND Ga, Dec. 23, 1987), App 81. Worthy testified that someone at some time requested permission to move Evans near McCleskey's cell. He contradicted himself, however, concerning when, why, and by whom Evans was moved, and about whether he overheard investigators urging Evans to engage McCleskey in conversation. Id., at 76-81.

On December 23, 1987, the District Court granted McCleskey relief based upon a violation of Massiah. Id., at 63-97. The court stated that the Evans statement "contains strong indication of an ab initio relationship between Evans and the authorities." Id., at 84. In addition, the court credited Worthy's testimony suggesting that the police had used Evans to obtain incriminating information from McCleskey. Based on the Evans statement and portions of Worthy's testimony, the District Court found that the jail authorities had placed Evans in the cell adjoining McCleskey's "for the purpose of gathering incriminating information"; that "Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public"; that Evans talked with McCleskey and eavesdropped on McCleskey's conversations with others; and that Evans reported what he had heard to the authorities. Id., at 83. These findings, in the District Court's view, established a Massiah violation.

In granting habeas relief, the District Court rejected the State's argument that McCleskey's assertion of the Massiah claim for the first time in the second federal petition constituted an abuse of the writ. The court ruled that McCleskey did not deliberately abandon the claim after raising it in his first state habeas petition. "This is not a case," the District

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Court reasoned, "where petitioner has reserved his proof or deliberately withheld his claim for a second petition." Id., at 84. The District Court also determined that when McCleskey filed his first federal petition, he did not know about either the 21-page Evans document or the identity of Worthy, and that the failure to discover the evidence for the first federal petition "was not

due to [McCleskey's] inexcusable neglect." Id., at 85.

The Eleventh Circuit reversed, holding that the District Court abused its discretion by failing to dismiss McCleskey's Massiah claim as an abuse of the writ. 890 F2d 342 (CA11 1989). The Court of Appeals agreed with the District Court that the petitioner must "show that he did not deliberately abandon the claim and that his failure to raise it [in the first federal habeas proceeding] was not due to inexcusable neglect." Id., at 346-347. Accepting the District Court's findings that at the first petition stage McCleskey knew neither the existence of the Evans statement nor the identity of Worthy, the court held that the District Court "misconstru[ed] the meaning of deliberate abandonment." Id., at 348-349. Because McCleskey included a Massiah claim in his first state petition, dropped it in his first federal petition, and then reasserted it in his second federal petition, he "made a knowing choice not to pursue the claim after having raised it previously" that constituted a prima facie showing of "deliberate abandonment." 890 F2d, at 349. The court further found the State's alleged concealment of the Evans statement irrelevant because it "was simply the catalyst that caused counsel to pursue the Massiah claim more vigorously" and did not itself "demonstrate the existence of a Massiah violation." Id., at 350. The court concluded that McCleskey had presented no reason why counsel could not have discovered Worthy earlier. Ibid. Finally, the court ruled that McCleskey's claim did not fall within the ends of justice exception to the abuse-of-the-writ doctrine because any

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Massiah violation that may have been committed would have been harmless error. 890 F2d at 350-351.

McCleskey petitioned this Court for a writ of certiorari, alleging numerous errors in the Eleventh Circuit's abuse-of-the-writ analysis. In our order granting the petition, we requested the parties to address the following additional question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?" 496 US 904, 110 L Ed 2d 266, 110 S Ct 2585 (1990).

II

The parties agree that the government has the burden of pleading abuse of the writ, and that once the government makes a proper submission, the petitioner must show that he has not abused the writ in seeking habeas relief. See Sanders v United States, 373 US 1, 10-11, 10 L Ed 2d 148, 83 S Ct 1068 (1963); Price v Johnston, 334 US 266, 292, 92 L Ed 1356, 68 S Ct 1049 (1948). Much confusion exists though, on the standard for determining when a petitioner abuses the writ. Although the standard is central to the proper determination of many federal habeas corpus actions, we have had little occasion to define it. Indeed, there is truth to the observation that we have defined abuse of the writ in an oblique way, through dicta and denials of certiorari petitions or stay applications. See Witt v Wainwright, 470 US 1039, 1043, 84 L Ed 2d 801, 105 S Ct 1415 (1985) (Marshall, J., dissenting). Today we give the subject our careful consider-

ation. We begin by tracing the historical development of some of the substantive and procedural aspects of the writ, and then consider the standard for abuse that district courts should apply in actions seeking federal habeas corpus relief.

A

The Judiciary Act of 1789, ch 20, § 14, 1 Stat 81-82, empowered federal courts to issue writs of habeas corpus to prisoners "in custody, under or by colour of the authority of
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the United States." In the early decades of our new federal system, English common law defined the substantive scope of the writ. Ex parte Watkins, 3 Pet 193, 201-203, 7 L Ed 650 (1830). Federal prisoners could use the writ to challenge confinement imposed by a court that lacked jurisdiction, ibid., or detention by the Executive without proper legal process, see Ex parte Wells, 18 How 307, 15 L Ed 421 (1856).

The common-law limitations on the scope of the writ were subject to various expansive forces, both statutory and judicial. See generally Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv L Rev 441, 463-499 (1963). The major statutory expansion of the writ occurred in 1867, when Congress extended federal habeas corpus to prisoners held in state custody. Act of Feb. 5, 1867, ch 28, § 1, 14 Stat 385. For the most part, however, expansion of the writ has come through judicial decision-making. As then-Justice Rehnquist explained in Wainwright v Sykes, 433 US 72, 79, 53 L Ed 2d 594, 97 S Ct 2497 (1977), the Court began by interpreting the concept of jurisdictional defect with generosity to include sentences imposed without statutory authorization, Ex parte Lange, 18 Wall 163, 176, 21 L Ed 872 (1874), and convictions obtained under an unconstitutional statute, Ex parte Siebold, 100 US 371, 376-377, 25 L Ed 717 (1880). Later, we allowed habeas relief for confinement under a state conviction obtained without adequate procedural protections for the defendant. Frank v Mangum, 237 US 309, 59 L Ed 969, 35 S Ct 582 (1915); Moore v Dempsey, 261 US 86, 67 L Ed 543, 43 S Ct 265 (1923).

[3] Confronting this line of precedents extending the reach of the writ, in Waley v Johnston, 316 US 101, 86 L Ed 1302, 62 S Ct 964 (1942), "the Court openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.' " Wainwright v Sykes, supra, at 79, 53 L Ed 2d 594, 97 S Ct 2497 (quoting Waley v Johnston, supra, at
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104-105, 86 L Ed 1302, 62 S Ct 964). With the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court, Stone v Powell, 428 US 465, 495, 49 L Ed 2d 1067, 96 S Ct 3037 (1976), the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner. See Brown v Allen, 344 US 443, 97 L Ed 469, 73 S Ct 397 (1953); Wainwright v Sykes, supra, at 79, 53 L Ed 2d 594, 97 S Ct 2497.

[4a] One procedural requisite is that a petition not lead to an abuse of the writ. We must next consider

the origins and meaning of that rule.

B

At common law, res judicata did not attach to a court's denial of habeas relief. "[A] refusal to discharge on one writ [was] not a bar to the issuance of a new writ." 1 W. Bailey, Habeas Corpus and Special Remedies 206 (1913) (citing cases). "[A] renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." W. Church, Writ of Habeas Corpus § 386, p 570 (2d ed 1893) (hereinafter Church). See, e.g., Ex parte Kaine, 14 F Cas 78, 80 (No. 7,597) (CC SDNY 1853); In re Kopel, 148 F 505, 506 (SDNY 1906). The rule made sense because at common law an order denying habeas relief could not be reviewed. Church 570; L. Yackle, Postconviction Remedies § 151, p 551 (1981); Goddard, A Note on Habeas Corpus, 65 L Q Rev 30, 32 (1949). Successive petitions served as a substitute for appeal. See W. Duker, A Constitutional History of Habeas Corpus 5-6 (1980); Church 570; Goddard, supra, at 35.

As appellate review became available from a decision in habeas refusing to discharge the prisoner, courts began to question the continuing validity of the common-law rule allowing endless successive petitions. Church 602. Some courts rejected the common-law rule, holding a denial of habeas relief

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res judicata. See, e.g., Perry v McLendon, 62 Ga 598, 603-605 (1879); McMahon v Mead, 30 SD 515, 518, 139 NW 122, 123 (1912); Ex parte Heller, 146 Wis 517, 524, 131 NW 991, 994 (1911). Others adopted a middle position between the extremes of res judicata and endless successive petitions. Justice Field's opinion on circuit in Ex parte Cuddy, 40 F 62 (CC SD Cal 1889), exemplifies this balance.

> "[W]hile the doctrine of res judicata does not apply, . . . the officers before whom the second application is made may take into consideration the fact that a previous application had been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it. . . . In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, or which might have been presented, on the first. The question is entirely different when subsequent occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are no new facts which did not exist when the first was presented. . . . I am of the opinion that in such a case a second application should not be heard . . . ." Id., at 65-66.

Cf. Ex parte Moebus, 148 F 39, 40-41 (NH 1906) (second petition disallowed "unless some substantial change in the circumstances had intervened").

We resolved the confusion over

the continuing validity of the common-law rule, at least for federal courts, in Salinger v Loisel, 265 US 224, 68 L Ed 989, 44 S Ct 519 (1924), and Wong Doo v United States, 265 US 239, 68 L Ed 999, 44 S Ct 524 (1924). These decisions reaffirmed that res judicata does not apply "to a decision on habeas corpus refusing to discharge the prisoner." Salinger v Loisel,

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supra, at 230, 68 L Ed 989, 44 S Ct 519; see Wong Doo v United States supra, at 240, 68 L Ed 999, 44 S Ct 524. They recognized, however, that the availability of appellate review required a modification of the common-law rule allowing endless applications. As we explained in Salinger:

> "In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed . . . ." 265 US, at 230-231, 68 L Ed 989, 44 S Ct 519.

Relying on Justice Field's opinion in Ex parte Cuddy, we announced that second and subsequent petitions should be

> "disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application." 265 US, at 231, 68 L Ed 989, 44 S Ct 519.

Because the lower court in Salinger had not disposed of the subsequent application for habeas corpus by reliance on dismissal of the prior application, the decision did not present an opportunity to apply the doctrine of abuse of the writ. 265 US, at 232, 68 L Ed 989, 44 S Ct 519. Wong Doo did present the question. There, the District Court had dismissed on res judicata grounds a second petition containing a due process claim that was raised, but not argued, in the first federal habeas petition. The petitioner "had full opportunity to offer proof of [his due process claim] at the hearing on the first petition," and he offered "[n]o reason for not presenting the proof at the outset . . . ." Wong Doo, 265 US, at 241, 68 L Ed 999, 44 S Ct 524. The record of the first petition did not contain proof of the due process claim,

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but "what [was] said of it there and in the briefs show[ed] that it was accessible all the time." Ibid. In these circumstances, we upheld the dismissal of the second petition. We held that "according to a sound judicial discretion, controlling weight must have been given to the prior refusal." Ibid. So while we rejected res judicata in a strict sense as a basis for dismissing a later habeas action, we made clear that the prior adjudication bore vital relevance to the exercise of the court's discretion in determining whether to consider the petition.

Price v Johnston, 334 US 266, 92 L Ed 1356, 68 S Ct 1049 (1948), the next decision in this line, arose in a somewhat different context from Salinger or Wong Doo. In Price, the petitioner's fourth habeas petition

alleged a claim that, arguably at least, was neither the explicit basis of a former petition nor inferable from the facts earlier alleged. The District Court and Court of Appeals dismissed the petition without hearing on the sole ground that the claim was not raised in one of the earlier habeas actions. We reversed and remanded, reasoning that the dismissal "precluded a proper development of the issue of the allegedly abusive use of the habeas corpus writ." 334 US, at 293, 92 L Ed 1356, 68 S Ct 1049. We explained that the State must plead an abuse of the writ with particularity, and that the burden then shifts to petitioner to show that presentation of the new claim does not constitute abuse. Id., at 292, 92 L Ed 1356, 68 S Ct 1049. The District Court erred because it dismissed the petition without affording the petitioner an opportunity to explain the basis for raising his claim late. We gave directions for the proper inquiry in the trial court. If the explanation "is inadequate, the court may dismiss the petition without further proceedings." Ibid. But if a petitioner "present[s] adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay," he must be given the opportunity to develop these matters in a hearing. Id., at 291-292, 92 L Ed 1356, 68 S Ct 1049. Without considering whether the petitioner had abused the writ, we remanded the case.

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Although Price recognized that abuse-of-the-writ principles limit a petitioner's ability to file repetitive petitions, it also contained dicta touching on the standard for abuse that appeared to contradict this point. Price stated that "the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition." Id., at 289, 92 L Ed 1356, 68 S Ct 1049. This proposition ignored the significance of appellate jurisdictional changes, see supra, at 479-480, 113 L Ed 2d, at 535, as well as the general disfavor we had expressed in Salinger and Wong Doo toward endless repetitive petitions. It did not even comport with language in Price itself which recognized that in certain circumstances new claims raised for the first time in a second or subsequent petition should not be entertained. As will become clear, the quoted portion of Price has been ignored in our later decisions.

One month after the Price decision, Congress enacted legislation, 28 USC § 2244 [28 USCS § 2244], which for the first time addressed the issue of repetitive federal habeas corpus petitions:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." 28 USC § 2244 (1964 ed) [28 USCS § 2244].

Because § 2244 allowed a district

court to dismiss a successive petition that "present[ed] no new ground not theretofore presented and determined," one might have concluded, by negative implication, that Congress denied permission to dismiss any petition that alleged new grounds for relief. Such an interpretation would have superseded the judicial principles

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recognizing that claims not raised or litigated in a prior petition could, when raised in a later petition, constitute abuse. But the Reviser's Note to the 1948 statute made clear that as a general matter Congress did not intend the new section to disrupt the judicial evolution of habeas principles, 28 USC § 2244 (1964 ed) [28 USCS § 2244] (Reviser's Note), and we confirmed in Sanders v United States, 373 US, at 11-12, 10 L Ed 2d 148, 83 S Ct 1068, that Congress' silence on the standard for abuse of the writ involving a new claim was "not intended to foreclose judicial application of the abuse-of-writ principle as developed in Wong Doo and Price."

Sanders also recognized our special responsibility in the development of habeas corpus with respect to another provision of the 1948 revision of the judicial code, 28 USC § 2255 (1964 ed) [28 USCS § 2255]. The statute created a new postconviction remedy for federal prisoners with a provision for repetitive petitions different from the one found in § 2244. While § 2244 permitted dismissal of subsequent habeas petitions that "present[ed] no new ground not theretofore presented and determined," § 2255 allowed a federal district court to refuse to entertain a subsequent petition seeking "similar relief." On its face, § 2255 appeared to announce a much stricter abuse-of-the-writ standard than its counterpart in § 2244. We concluded in Sanders, however, that the language in § 2255 "cannot be taken literally," and construed it to be the "material equivalent" of the abuse standard in § 2244. Sanders v United States, supra, at 13-14, 10 L Ed 2d 148, 83 S Ct 1068.

In addition to answering these questions, Sanders undertook a more general "formulation of basic rules to guide the lower federal courts" concerning the doctrine of abuse of the writ. Id., at 15, 10 L Ed 2d 148, 83 S Ct 1068. After reiterating that the government must plead abuse of the writ and the petitioner must refute a well-pleaded allegation, Sanders addressed the definition of and rationale for the doctrine. It noted that equitable principles governed abuse of the writ, including "the principle that a suitor's conduct in relation to the matter at hand may

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disentitle him to the relief he seeks," and that these principles must be applied within the sound discretion of district courts. Id., at 17-18, 10 L Ed 2d 148, 83 S Ct 1068. The Court furnished illustrations of writ abuse:

> "Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in Wong Doo, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain col-

> lateral proceedings whose only purpose is to vex, harass, or delay." Id., at 18, 10 L Ed 2d 148, 83 S Ct 1068.

The Court also cited Fay v Noia, 372 US 391, 438-440, 9 L Ed 2d 837, 83 S Ct 822 (1963), and Townsend v Sain, 372 US 293, 317, 9 L Ed 2d 770, 83 S Ct 745 (1963), for further guidance on the doctrine of abuse of the writ, stating that the principles of those cases "govern equally here." 373 US, at 18, 10 L Ed 2d 148, 83 S Ct 1068. Finally, Sanders established that federal courts must reach the merits of an abusive petition if "the ends of justice demand." Ibid.

Three years after Sanders, Congress once more amended the habeas corpus statute. The amendment was an attempt to alleviate the increasing burden on federal courts caused by successive and abusive petitions by "introducing a greater degree of finality of judgments in habeas corpus proceedings." S Rep No. 1797, 89th Cong, 2d Sess, 2 (1966); see also HR Rep No. 1892, 89th Cong, 2d Sess, 5-6 (1966). The amendment recast § 2244 into three subparagraphs. Subparagraph (a) deletes the reference to state prisoners in the old § 2244 but left the provision otherwise intact. 28 USC § 2244(a) [28 USCS § 2244(a)]. Subparagraph (c) states that where a state prisoner seeks relief for an alleged denial of a federal

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constitutional right before this Court, any decision rendered by the Court shall be "conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right . . . ." 28 USC § 2244(c) [28 USCS § 2244(c)].

[4b] Congress added subparagraph (b) to address repetitive applications by state prisoners:

> "(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." 28 USC § 2244(b) [28 USCS § 2244(b)].

Subparagraph (b) establishes a "qualified application of the doctrine of res judicata." S Rep No. 1797, supra, at 2. It states that a federal court "need not entertain" a second or subsequent habeas petition "unless" the petitioner satisfies two conditions. First, the subsequent petition must allege a new ground, factual or otherwise. Second, the applicant must satisfy the judge that he did not deliberately withhold the ground earlier or "otherwise abus[e] the writ." See Smith v Yeager, 393 US 122, 125, 21 L Ed 2d 246, 89 S Ct 277 (1968) ("essential question [under § 2244(b)] is whether the petitioner 'deliberately withheld the newly asserted ground' in the prior proceeding, or 'otherwise abused the

writ' "). If the petitioner meets these conditions, the court must consider the subsequent petition

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as long as other habeas errors, such as nonexhaustion, 28 USC § 2254(b) [28 USCS § 2254(b)], or procedural default, Wainwright v Sykes, 433 US 72, 53 L Ed 2d 594, 97 S Ct 2497 (1977), are not present.

Section 2244(b) raises, but does not answer, other questions. It does not state whether a district court may overlook a deliberately withheld or otherwise abusive claim to entertain the petition in any event. That is, it does not state the limits on the district court's discretion to entertain abusive petitions. Nor does the statute define the term "abuse of the writ." As was true of similar silences in the original 1948 version of § 2244, however, see supra, at 484, 113 L Ed 2d, at 538, Congress did not intend § 2244(b) to foreclose application of the court-announced principles defining and limiting a district court's discretion to entertain abusive petitions. See Delo v Stokes, 495 US 329, 321-322, 109 L Ed 2d 325, 110 S Ct 1880 (1990) (District Court abused discretion in entertaining a new claim in a fourth federal petition that was an abuse of the writ).

Rule 9(b) of the Rules Governing Habeas Corpus Proceedings, promulgated in 1976, also speaks to the problem of new grounds for relief raised in subsequent petitions. It provides:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." 28 USC § 2254 Rule 9(b) [USCS Court Rules, § 2254 Rules, Rule 9(b)].

Like 28 USC § 2244(b) [28 USCS § 2244(b)], Rule 9(b) "incorporates the judge-made principle governing the abuse of the writ set forth in Sanders." Rose v Lundy, 455 US 509, 521, 71 L Ed 2d 379, 102 S Ct 1198 (1982) (plurality opinion); id., at 533, 71 L Ed 2d 379, 102 S Ct 1198 (Brennan, J., concurring in part and dissenting in part) (same). The Advisory Committee Notes make clear that a new claim in a subsequent petition should not be entertained if the judge finds the failure to raise it earlier "inexcusable." Advisory Committee Notes to

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Rule 9, 28 USC, pp 426-427 [USCS Court Rules, § 2254 Rules. Notes following Rule 9]. The Notes also state that a retroactive change in the law and newly discovered evidence represent acceptable excuses for failing to raise the claim earlier. Id., at 427 [USCS Court Rules, § 2254 Rules, Notes following Rule 9].

In recent years we have applied the abuse-of-the-writ doctrine in various contexts. In Woodard v Hutchins, 464 US 377, 78 L Ed 2d 541, 104 S Ct 752 (1984) (per curiam), the petitioner offered no explanation for asserting three claims in a second federal habeas petition not raised in the first. Five Justices inferred from the lack of explanation that the three claims "could and should have been raised in" the first petition, and that the failure to do so constituted abuse of the writ. Id., at 378-379, and n 3, 78 L Ed 2d 541, 104 S Ct 752 (Powell, J., joined by four Justices, concurring in grant of application to vacate stay). Simi-

larly, in Antone v Dugger, 465 US 200, 79 L Ed 2d 147, 104 S Ct 962 (1984) (per curiam), we upheld the Court of Appeals' judgment that claims presented for the first time in a second federal petition constituted an abuse of the writ. We rejected petitioner's argument that he should be excused from his failure to raise the claims in the first federal petition because his counsel during first federal habeas prepared the petition in haste and did not have time to become familiar with the case. Id., at 205-206, and n 4, 79 L Ed 2d 147, 104 S Ct 962. And just last Term, we held that claims raised for the first time in a fourth federal habeas petition abused the writ because they "could have been raised" or "could have been developed" in the first federal habeas petition. Delo v Stokes, supra, at 321-322, 109 L Ed 2d 325, 110 S Ct 1880. See also Kuhlmann v Wilson, 477 US 436, 444, n 6, 91 L Ed 2d 364, 106 S Ct 2616 (1986) (plurality opinion) (petition that raises grounds "available but not relied upon in a prior petition" is an example of abuse of the writ); Straight v Wainwright, 476 US 1132, 1133, 90 L Ed 2d 683, 106 S Ct 2004 (1986) (Powell, J., joined by three Justices, concurring in denial of stay) (new arguments in second petition that "plainly could have been raised earlier" constitute abuse of the writ); Rose v Lundy, supra, at 521, 71 L Ed 2d 379, 102 S Ct 1198 (plurality opinion) (prisoner who proceeds with exhausted claims in first federal

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petition and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions).

III

Our discussion demonstrates that the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. Because of historical changes and the complexity of the subject, the Court has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ." Fay v Noia, 372 US, at 411-412, 9 L Ed 2d 837, 83 S Ct 822. Today we attempt to define the doctrine of abuse of the writ with more precision.

[4c] Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. Sanders mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief. Sanders cited a passage in Townsend v Sain, 372 US, at 317, 9 L Ed 2d 770, 83 S Ct 745, which applied the principle of inexcusable neglect, and noted that this principle also governs in the abuse-of-the-writ context, Sanders v United States, 373 US, at 18, 10 L Ed 2d 148, 83 S Ct 1068.

[1b, 4d] As Sanders' reference to Townsend demonstrates, as many Courts of Appeals recognize, see, e.g., McCleskey v Zant, 890 F2d, at 346-347; Hall v Lockhart, 863 F2d 609, 610 (CA8 1988); Jones v Estelle, 722 F2d 159, 163 (CA5 1983); Miller v Bordenkircher, 764 F2d 245, 250-252 (CA4 1985), and as McCleskey concedes, Brief for Petitioner 39-40, 45-48, a petitioner may abuse the writ by failing to raise a claim through inexcusable neglect. Our recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of

whether the failure to raise it earlier stemmed from a deliberate choice. See, e.g., Delo v Stokes, 495 US, at 321-322, 109 L Ed 2d 325, 110 S Ct 1880; Antone v Dugger, supra, at 205-206, 79 L Ed 2d 147, 104 S Ct 962. See also 28 USC § 2244(b) [28 USCS § 2244(b)] (recognizing that a petitioner

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can abuse the writ in a fashion that does not constitute deliberate abandonment).

The inexcusable neglect standard demands more from a petitioner than the standard of deliberate abandonment. But we have not given the former term the content necessary to guide district courts in the ordered consideration of allegedly abusive habeas corpus petitions. For reasons we explain below, a review of our habeas corpus precedents leads us to decide that the same standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse-of-the-writ context.

[1c, 4e, 5a, 6] The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion. See Reed v Ross, 468 US 1, 9, 82 L Ed 2d 1, 104 S Ct 2901 (1984) (procedural default); Sanders v United States, 373 US, at 17-18, 10 L Ed 2d 148, 83 S Ct 1068 (abuse of the writ). In habeas, equity recognizes that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." Id., at 17, 10 L Ed 2d 148, 83 S Ct 1068. For these reasons, both the abuse-of-the-writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

[1d] The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant

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costs of federal habeas corpus review. To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." Teague v Lane, 489 US 288, 309, 103 L Ed 2d 334, 109 S Ct 1060 (1989). And when a habeas petitioner succeeds in obtaining a new trial, the " 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," Kuhlmann v Wilson, supra, at 453, 91 L Ed 2d 364, 106 S Ct 2616, prejudice the government and diminish the chances of a reliable criminal adjudication. Though Fay v Noia, supra, may have cast doubt upon these propositions, since Fay we have taken care in our habeas corpus decisions to reconfirm the importance of finality. See, e.g.,

Teague v Lane, supra, at 308-309, 103 L Ed 2d 334, 109 S Ct 1060; Murray v Carrier, 477 US 478, 487, 91 L Ed 2d 397, 106 S Ct 2639 (1986); Reed v Ross, supra, at 10, 82 L Ed 2d 1, 104 S Ct 2901; Engle v Isaac, 456 US 107, 127, 71 L Ed 2d 783, 102 S Ct 1558 (1982).

Finality has special importance in the context of a federal attack on a state conviction. Murray v Carrier, supra, at 487, 91 L Ed 2d 397, 106 S Ct 2639; Engle v Isaac, supra, at 128, 71 L Ed 2d 783, 102 S Ct 1558. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " Murray v Carrier, supra, at 487, 91 L Ed 2d 397, 106 S Ct 2639 (quoting Engle, supra, at 128, 71 L Ed 2d 783, 102 S Ct 1558). Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.

Habeas review extracts further costs. Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes. Schneckloth v Bustamonte, 412 US 218, 260, 36 L Ed 2d 854, 93 S Ct 2041 (1973) (Powell, J., concurring). Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to

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present claims when evidence is fresh. Reed v Ross, supra, at 13, 82 L Ed 2d 1, 104 S Ct 2901; Wainwright v Sykes, 433 US, at 89, 53 L Ed 2d 594, 97 S Ct 2497.

Far more severe are the disruptions when a claim is presented for the first time in a second or subsequent federal habeas petition. If "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused," Engle v Isaac, supra, at 126-127, 71 L Ed 2d 783, 102 S Ct 1558, the ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.

> "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." Bator, 76 Harv L Rev, at 452-453 (footnotes omitted).

If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action. The phenomenon calls to mind Justice Jackson's admonition that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." Brown v Allen, 344 US, at 537, 97 L Ed 469, 73 S Ct 397 (opinion concurring in result). And if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend

its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition.

The federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a

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proper manner in a habeas petition. Our procedural default jurisprudence and abuse-of-the-writ jurisprudence help define this dimension of procedural regularity. Both doctrines impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones; both recognize the law's interest in finality; and both invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence. It is true that a habeas court's concern to honor state procedural default rules rests in part on respect for the integrity of procedures "employed by a coordinate jurisdiction within the federal system," Wainwright v Sykes, supra, at 88, 53 L Ed 2d 594, 97 S Ct 2497, and that such respect is not implicated when a petitioner defaults a claim by failing to raise it in the first round of federal habeas review. Nonetheless, the doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.

We conclude from the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts. We have held that a procedural default will be excused upon a showing of cause and prejudice. Wainwright v Sykes, supra. We now hold that the same standard applies to determine if there has been an abuse of the writ through inexcusable neglect.

[7] In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. Murray v Carrier, 477 US, at 488, 91 L Ed 2d 397, 106 S Ct 2639. Objective

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factors that constitute cause include " 'interference by officials' " that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." Ibid. In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." Ibid. Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. Id., at 486-488, 91 L Ed 2d 397, 106 S Ct 2639. Once the petitioner has established cause, he must show " 'actual prejudice' resulting from the errors of which he complains." United States v Frady, 456 US 152, 168, 71 L Ed 2d 816, 102 S Ct 1584 (1982).

Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These

are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice. Murray v Carrier, supra, at 485, 91 L Ed 2d 397, 106 S Ct 2639.

[5b] The cause and prejudice anal ysis we have adopted for cases of procedural default applies to an abuse-of-the-writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may

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nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim. Application of the cause and prejudice standard in the abuse-of-the-writ context does not mitigate the force of Teague v Lane, 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060 (1989), which prohibits, with certain exceptions, the retroactive application of new law to claims raised in federal habeas. Nor does it imply that there is a constitutional right to counsel in federal habeas corpus. See Pennsylvania v Finley, 481 US 551, 555, 95 L Ed 2d 539, 107 S Ct 1990 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further").

[1e] Although the cause and prejudice standard differs from some of the language in Price v Johnston, 334 US 266, 92 L Ed 1356, 68 S Ct 1049 (1948), it is consistent with Cuddy, Salinger, Wong Doo, and Sanders, as well as our modern abuse-of-the-writ decisions, including Antone, Woodard, and Delo. In addition, the exception to cause for fundamental miscarriages of justice gives meaningful content to the otherwise unexplained "ends of justice" inquiry mandated by Sanders. Sanders drew the phrase "ends of justice" from the 1948 version of § 2244. 28 USC § 2244 (1964 ed) [28 USCS § 2244] (judge need not entertain subsequent application if he is satisfied that "the ends of justice will not be served by such inquiry"). Sanders v United States, 373 US, at 15-17, 10 L Ed 2d 148, 83 S Ct 1068. Although the 1966 revision to the habeas statute eliminated any reference to an "ends of justice" inquiry, a plurality of the Court in Kuhlmann v Wilson, 477 US, at 454, 91 L Ed 2d 364, 106 S Ct 2616, held that this inquiry remained appropriate, and required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a "colorable showing of factual innocence." The miscarriage of justice exception to cause serves as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty," Stone v Powell, 428 US, at

492-493, n 31, 49 L Ed 2d 1067, 96 S Ct 3037, guaranteeing that the ends of justice will be served in full.

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Considerations of certainty and stability in our discharge of the judicial function support adoption of the cause and prejudice standard in the abuse-of-the-writ context. Well defined in the case law, the standard will be familiar to federal courts. Its application clarifies the imprecise contours of the term "inexcusable neglect." The standard is an objective one, and can be applied in a manner that comports with the threshold nature of the abuse of the writ inquiry. See Price v Johnston, 334 US, at 287, 92 L Ed 1356, 68 S Ct 1049 (abuse of the writ is "preliminary as well as collateral to a decision as to the sufficiency or merits of the allegation itself"). Finally, the standard provides "a sound and workable means of channeling the discretion of federal habeas courts." Murray v Carrier, 477 US, at 497, 91 L Ed 2d 397, 106 S Ct 2639. "[I]t is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts." Brown v Allen, 344 US, at 501-502, 97 L Ed 469, 73 S Ct 397 (opinion of Frankfurter, J.).

The cause and prejudice standard should curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process. "Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus." Woodard v Hutchins, 464 US, at 380, 78 L Ed 2d 541, 104 S Ct 752. The writ of habeas corpus is one of the centerpieces of our liberties. "But the writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." Brown v Allen, supra, at 512, 97 L Ed 469, 73 S Ct 397 (opinion of Frankfurter, J.). Adoption of the cause and prejudice standard acknowledges the historic purpose and function of the writ in our constitutional system, and, by preventing its abuse, assures its continued efficacy.

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We now apply these principles to the case before us.

IV

[2b, 8a] McCleskey based the Massiah claim in his second federal petition on the 21-page Evans document alone. Worthy's identity did not come to light until the hearing. The District Court found, based on the document's revelation of the tactics used by Evans in engaging McCleskey in conversation (such as his pretending to be Ben Wright's uncle and his claim that he was supposed to participate in the robbery), that the document established an ab initio relationship between Evans and the authorities. It relied on the finding and on Worthy's later testimony to conclude that the State committed a Massiah violation.

This ruling on the merits cannot come before us or any federal court if it is premised on a claim that constitutes an abuse of the writ. We must consider, therefore, the preliminary question whether McCleskey had cause for failing to raise the

Massiah claim in his first federal petition. The District Court found that neither the 21-page document nor Worthy were known or discoverable before filing the first federal petition. Relying on these findings, McCleskey argues that his failure to raise the Massiah claim in the first petition should be excused. For reasons set forth below, we disagree.

[8b, 9] That McCleskey did not possess or could not reasonably have obtained certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event. "[C]ause . . . requires a showing of some external impediment *preventing* counsel from constructing or raising the claim." Murray v Carrier, 477 US, at 492, 91 L Ed 2d 397, 106 S Ct 2639 (emphasis added). For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. See id., at 488, 91 L Ed 2d 397, 106 S Ct 2639 (cause if "interference by officials . . . made compliance

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impracticable"); Amadeo v Zant, 486 US 214, 222, 100 L Ed 2d 249, 108 S Ct 1771 (1988) (cause if unavailable evidence "was the reason" for default). Abuse-of-the-writ doctrine examines *petitioner's* conduct: The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process, see 28 USC § 2254 Rule 6 (Discovery); Rule 7 (Expansion of Record); Rule 8 (Evidentiary Hearing) [USCS Court Rules, § 2254 Rules, Rules 6, 7, 8]. The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

[8c] In applying these principles, we turn first to the 21-page signed statement. It is essential at the outset to distinguish between two issues: (1) Whether petitioner knew about or could have discovered the 21-page document; and (2) whether he knew about or could have discovered the evidence the document recounted, namely the jail-cell conversations. The District Court's error lies in its conflation of the two inquiries, an error petitioner would have us perpetuate here.

[8d, 10a] The 21-page document unavailable to McCleskey at the time of the first petition does not establish that McCleskey had cause for failing to raise the Massiah claim at the outset.* Based on testimony

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* **[8e, 10b]** We accept as not clearly erroneous the District Court finding that the document itself was neither known nor reasonably discoverable at the time of the first federal petition. We note for the sake of completeness, however, that this finding is not free from substantial doubt. The record contains much evidence that McCleskey knew, or should have known, of the written document. When McCleskey took the stand at trial, the prosecutor asked him about conversations with a prisoner in an adjacent cell. These questions provoked a side-bar conference. The lawyers for the defense reasserted their re-

and questioning at trial, McCleskey
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knew that he had confessed the murder during jail-cell conversations with Evans, knew that Evans claimed to be a relative of Ben Wright during the conversations, and knew that Evans told the police about the conversations. Knowledge of these facts alone would put McCleskey on notice to pursue the Massiah claim in his first federal habeas petition as he had done in the first state habeas petition.

[8f] But there was more. The District Court's finding that the 21-page document established an ab initio relationship between Evans and the authorities rested in its entirety on conversations in which McCleskey himself participated.
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Though at trial McCleskey denied the inculpatory conversations, his current arguments presuppose them. Quite apart from the inequity in McCleskey's reliance on that which he earlier denied under oath, the more fundamental point remains that because McCleskey participated in the conversations reported by Evans, he knew everything in the document that the District Court relied upon to establish the ab initio connection between Evans and the police. McCleskey has had at least constructive knowledge all along of the facts he now claims to have learned only from the 21-page document. The unavailability of the document did not prevent McCleskey from raising the Massiah claim in the first federal petition and is not cause for his failure to do so. And of course, McCleskey cannot contend that his false representations at trial constitute cause for the omission of a claim from the first federal petition.

The District Court's determination that jailer Worthy's identity and testimony could not have been known prior to the first federal petition does not alter our conclusion. It must be remembered that the 21-page statement was the only new evidence McCleskey had when he filed the Massiah claim in the second federal petition in 1987. Under McCleskey's own theory, nothing was known about Worthy even then. If McCleskey did not need to know about Worthy and his testimony to press the Massiah claim in the second petition, neither did he need to

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quest for "statements from the defendant," to which the court responded that "a statement . . . was furnished to the Court but . . . doesn't help [McCleskey]." App 17. If there were any doubt about an additional document, it is difficult to see why such doubt had not evaporated by the time of the direct appeal and both the first state and first federal habeas actions. In those proceedings McCleskey made deliberate withholding of a statement by McCleskey to Evans the specific basis for a Brady claim. In rejecting this claim on direct review, the Georgia Supreme Court said: "The prosecutor showed the defense counsel his file, *but did not furnish this witness' [i. e. Evans'] statement.*" McClesky v State, 245 Ga 108, 112, 263 SE2d 146, 150 (1980) (emphasis added). At the first state habeas corpus hearing, McCleskey's trial counsel testified that the prosecutor told him that the statement of an unnamed individual had been presented to the trial court but withheld from the defense. The prosecutor made clear the individual's identity in his February 1981 state habeas deposition when he stated:

". . . Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter that was made [in] in camera inspection by the judge prior to trial." App 25.

All of this took place before the first federal petition. The record, then, furnishes strong evidence that McCleskey knew or should have known of the Evans document before the first federal petition but chose not to pursue it. We need not pass upon the trial court's finding to the contrary, however, for the relevant question in this case is whether he knew or should have known of the contents of the conversations recounted in the document.

know about him to assert it in the first. Ignorance about Worthy did not prevent McCleskey from raising the Massiah claim in the first federal petition and will not excuse his failure to do so.

Though this reasoning suffices to show the irrelevance of the District Court's finding concerning Worthy, the whole question illustrates the rationale for requiring a prompt investigation and the full pursuit of habeas claims in the first petition. At the time of the first federal petition, written logs and records with prison staff names and assignments existed. By the time of the second federal petition officials had

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destroyed the records pursuant to normal retention schedules. Worthy's inconsistent and confused testimony in this case demonstrates the obvious proposition that factfinding processes are impaired when delayed. Had McCleskey presented this claim in the first federal habeas proceeding when official records were available, he could have identified the relevant officers and cell assignment sheets. The critical facts for the Massiah claim, including the reason for Evans' placement in the cell adjacent to McCleskey's and the precise conversation that each officer had with Evans before he was put there, likely would have been reconstructed with greater precision than now can be achieved. By failing to raise the Massiah claim in 1981, McCleskey foreclosed the procedures best suited for disclosure of the facts needed for a reliable determination.

McCleskey nonetheless seeks to hold the State responsible for his omission of the Massiah claim in the first petition. His current strategy is to allege that the State engaged in wrongful conduct in withholding the 21-page document. This argument need not detain us long. When all is said and done, the issue is not presented in the case, despite all the emphasis upon it in McCleskey's brief and oral argument. The Atlanta police turned over the 21-page document upon request in 1987. The District Court found no misrepresentation or wrongful conduct by the State in failing to hand over the document earlier, and our discussion of the evidence in the record concerning the existence of the statement, see n*, supra, as well as the fact that at least four courts have considered and rejected petitioner's Brady claim, belies McCleskey's characterization of the case. And as we have taken care to explain, the document is not critical to McCleskey's notice of a Massiah claim anyway.

Petitioner's reliance on the procedural default discussion in Amadeo v Zant, 486 US 214, 100 L Ed 2d 249, 108 S Ct 1771 (1988), is misplaced. In Amadeo the Court mentioned that government concealment of evidence could be cause for a procedural default if it "was

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the reason for the failure of a petitioner's lawyers to raise the jury challenge in the trial court." Id., at 222, 100 L Ed 2d 249, 108 S Ct 1771. This case differs from Amadeo in two crucial respects. First, there is no finding that the State concealed evidence. And second, even if the State intentionally concealed the 21-page document, the concealment would not establish cause here because, in light of McCleskey's knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition.

[2c] As McCleskey lacks cause for failing to raise the Massiah claim in the first federal petition, we need not consider whether he would be prejudiced by his inability to raise the alleged Massiah violation at this late date. See Murray v Carrier, 477 US, at 494, 91 L Ed 2d 397, 106 S Ct 2639 (rejecting proposition that showing of prejudice permits relief in the absence of cause).

We do address whether the Court should nonetheless exercise its equitable discretion to correct a miscarriage of justice. That narrow exception is of no avail to McCleskey. The Massiah violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. The very statement McCleskey now seeks to embrace confirms his guilt. As the District Court observed:

> "After having read [the Evans statement], the court has concluded that nobody short of William Faulkner could have contrived that statement, and as a consequence finds the testimony of Offie Evans absolutely to be true, and the court states on the record that it entertains absolutely no doubt as to the guilt of Mr. McCleskey." 4 Tr 4.

We agree with this conclusion. McCleskey cannot demonstrate that the alleged Massiah violation caused the conviction of an innocent person. Murray v Carrier, supra, at 496, 91 L Ed 2d 397, 106 S Ct 2639.

[1f, 2d] The history of the proceedings in this case, and the burden upon the State in defending against allegations made for the

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first time in federal court some nine years after the trial, reveal the necessity for the abuse-of-the-writ doctrine. The cause and prejudice standard we adopt today leaves ample room for consideration of constitutional errors in a first federal habeas petition and in a later petition under appropriate circumstances. Petitioner has not satisfied this standard for excusing the omission of the Massiah claim from his first petition. The judgment of the Court of Appeals is affirmed.

APPENDIX TO OPINION OF THE COURT

Petitioner's Claims for Relief at Various Stages of the Litigation

1. *Direct Appeal.* On direct appeal, McCleskey raised the following claims: (1) the death penalty was administered in a discriminatory fashion because of prosecutorial discretion; (2) the prosecutor conducted an illegal postindictment lineup; (3) the trial court erred in admitting at trial the statement McCleskey made to the police; (4) the trial court erred in allowing Evans to testify about McCleskey's jail-house confession; (5) the prosecutor failed to disclose certain impeachment evidence; and (6) the trial court erred in admitting evidence of McCleskey's prior criminal acts. McClesky v State, 245 Ga 108, 112-114, 263 SE2d 146, 149-151 (1980).

2. *First State Habeas Corpus Petition.* McCleskey's first state habeas petition alleged the following constitutional violations: (1) the Georgia death penalty is administered arbitrarily, capriciously, and whimsically; (2) Georgia officials imposed McCleskey's capital sentence pursuant to a pattern and practice of discrimination on the basis of race, sex, and poverty; (3) the death penalty lacks theoretical or factual justification and fails to serve any rational interest; (4) McCleskey's death sentence is cruel and unusual punishment in light of all mitigating factors; (5) McCleskey received inadequate notice and opportunity to be heard; (6) the jury did not constitute a fair cross section of the community; (7) the jury was biased

in favor of the prosecution; (8) the trial court improperly excused two jurors who were opposed to the death penalty; (9) McCleskey's postarrest statement should have been excluded because it was obtained after an allegedly illegal arrest; (10) the postarrest statement was extracted involuntarily; (11) the State failed to disclose an "arrangement" with one of its key witnesses, Evans; (12) the State deliberately withheld a statement made by McCleskey to Evans; (13) the trial court erred in failing to grant McCleskey funds to employ experts in aid of his defense; (14) three witnesses for the State witnessed a highly suggestive lineup involving McCleskey prior to trial; (15) the trial court's jury instructions concerning intent impermissibly shifted the burden of persuasion to McCleskey; (16) the prosecution impermissibly referred to the appellate process during the sentencing phase; (17) the trial court improperly admitted evidence of other crimes for which McCleskey had not been convicted; (18) the trial court's instructions concerning evidence of McCleskey's other bad acts was overbroad; (19) the appellate review procedures of Georgia denied McCleskey effective assistance of counsel, a fair hearing, and the basic tools of an adequate defense; (20) the means by which the death penalty is administered inflicts wanton and unnecessary torture; (21) McCleskey was denied effective assistance of counsel in numerous contexts; (22) introduction of statements petitioner made to Evans were elicited in a situation created to induce McCleskey to make incriminating statements; and (23) the evidence was insufficient to convict McCleskey of capital murder. Petition, HC No. 4909, 2 Tr, Exh H.

3. *First Federal Habeas Corpus Petition.* McCleskey raised the following claims in his first federal habeas petition: (1) the Georgia death penalty discriminated on

the basis of race; (2) the State failed to disclose an "understanding" with Evans; (3) the trialcourt's instructions to the jury impermissibly shifted the burden to McCleskey; (4) the prosecutor improperly referred to the appellate process at the sentencing

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phase; (5) the trial court impermissibly refused to grant McCleskey funds to employ experts in aid of his defense; (6) the trial court's instructions concerning evidence of McCleskey's other bad acts was overbroad; (7) the trial court's instructions gave the jury too much discretion to consider nonstatutory aggravating circumstances; (8) the trial court improperly admitted evidence of other crimes for which McCleskey had not been convicted; (9) three witnesses for the State witnessed a highly suggestive lineup involving McCleskey prior to trial; (10) McCleskey's postarrest statement should have been excluded because it was extracted involuntarily; (11) the trial court impermissibly excluded two jurors who were opposed to the death penalty; (12) the death penalty lacks theoretical or factual justification and fails to serve any rational interest; (13) the State deliberately withheld a statement made by McCleskey to Evans; (14) the evidence was insufficient to convict McCleskey of capital murder; (15) McCleskey's counsel failed to investigate the State's evidence adequately; (16) McCleskey's counsel failed to raise certain objections or make certain motions at trial; (17) McCleskey's counsel failed to undertake an independent investigation of possible mitigating circumstances prior to trial; and (18) after trial, McCleskey's counsel failed to review and correct the judge's sentence report. McCleskey v Zant, 580 F Supp 338 (ND Ga 1984).

4. *Second State Habeas Petition.* In his second state habeas petition, McCleskey alleged the following claims: (1) the prosecutor systematically excluded blacks from the jury; (2) the State of Georgia imposed the death penalty against McCleskey in a racially discriminatory manner; (3) the State failed to disclose its agreement with Evans; (4) the trial court impermissibly refused to grant McCleskey funds to employ experts in aid of his defense; and (5) the prosecutor improperly referred to the appellate process at the sentencing phase. Petition, 2 Tr, Exh G.

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5. *Second Federal Habeas Corpus Petition.* In his second federal habeas petition, McCleskey alleged the following claims: (1) Evans' testimony concerning his conversation with McCleskey was inadmissible because Evans acted as a state informant in a situation created to induce McCleskey to make incriminating statements; (2) the State failed to correct the misleading testimony of Evans; (3) the State failed to disclose "an arrangement" with Evans; (4) the prosecutor improperly referred to the appellate process at the sentencing phase; (5) the State systematically excluded blacks from McCleskey's jury; (6) the death penaltywas imposed on McCleskey pursuant to a pattern and practice of racial discrimination by Georgia officials against black defendants; and (7) the trial court impermissibly refused to grant McCleskey funds to employ experts in aid of his defense. Federal Habeas Petition, 1 Tr, Exh 1.

SEPARATE OPINION

Justice **Marshall,** with whom Justice **Blackmun** and Justice **Stevens** join, dissenting.

Today's decision departs drastically from the norms that inform the proper judicial function. Without even the most casual admission that it is discarding longstanding legal principles, the Court radically redefines the content of the "abuse of the writ" doctrine, substituting the strict-liability "cause and prejudice" standard of Wainwright v Sykes, 433 US 72, 53 L Ed 2d 594, 97 S Ct 2497 (1977), for the good-faith "deliberate abandonment" standard of Sanders v United States, 373 US 1, 10 L Ed 2d 148, 83 S Ct 1068 (1963). This doctrinal innovation, which repudiates a line of judicial decisions codified by Congress in the governing statute and procedural rules, was by no means foreseeable when the petitioner in this case filed his first federal habeas application. Indeed, the new rule announced and applied today was not even *requested* by respondent at any point in this litigation. Finally, rather than remand this case for reconsideration in light of its new standard, the majority performs an independent reconstruction of the record, disregarding the factual findings of the District Court and applying its new rule in a

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manner that encourages state officials to *conceal* evidence that would likely prompt a petitioner to raise a particular claim on habeas. Because I cannot acquiesce in this unjustifiable assault on the Great Writ, I dissent.

I

Disclaiming innovation, the majority depicts the "cause and prejudice" test as merely a clarification of existing law. Our decisions, the majority explains, have left "[m]uch confusion . . . on the standard for determining when a petitioner abuses the writ." Ante, at 477, 113 L Ed 2d, at 533. But amidst this "confusion," the majority purports to discern a trend toward the cause-and-prejudice standard and concludes that this is the rule that best comports with "our habeas corpus precedents," ante, at 490, 113 L Ed 2d, at 542; see ante, at 495, 113 L Ed 2d, at 545, and with the "complex and evolving body of equitable principles" that have traditionally defined the abuse-of-the-writ doctrine, id., at 489, 113 L Ed 2d, at 541. This attempt to gloss over the break between today's decision and established precedents is completely unconvincing.

Drawing on the practice at common law in England, this Court long ago established that the power of a federal court to entertain a second or successive petition should turn not on "the inflexible doctrine of res judicata" but rather on the exercise of "sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the subject." Wong Doo v United States, 265 US 239, 240-241, 68 L Ed 999, 44 S Ct 524 (1924); accord, Salinger v Loisel, 265 US 224, 230-232, 68 L Ed 989, 44 S Ct 519 (1924). Thus, in Wong Doo, the Court held that the District Court acted within its discretion in dismissing a petition premised on a ground that was raised but expressly abandoned in an earlier petition. "The petitioner had full opportunity," the Court explained, "to offer proof [of the abandoned ground] at the hearing on the first petition; and, if he was intending to rely on that ground, good

faith required that he produce the proof then." 265 US, at 241, 68 L Ed 999, 44 S Ct 524. Noting that the evidence supporting the abandoned ground had been "accessible

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all the time," the Court inferred that petitioner, an alien seeking to forestall his imminent deportation, had split his claims in order to "postpone the execution of the [deportation] order." Ibid.

In Price v Johnston, 334 US 266, 92 L Ed 1356, 68 S Ct 1049 (1948), in contrast, the Court held that the District Court abused its discretion by summarily dismissing a petition that raised a claim not asserted in any of three previous petitions filed by the same prisoner. Whereas it had been clear from the record that the petitioner in Wong Doo had possessed access to the facts supporting his abandoned claim, the District Court in Price had no basis for assuming that the prisoner had "acquired no new or additional information since" the disposition of his earlier petitions. Id., at 290, 92 L Ed 1356, 68 S Ct 1049. "[E]ven if it [had been] found that petitioner did have prior knowledge of all the facts concerning the allegation in question," the Court added, the District Court should not have dismissed the petition before affording the prisoner an opportunity to articulate "some justifiable reason [why] he was previously unable to assert his rights or was unaware of the significance of relevant facts." Id., at 291, 92 L Ed 1356, 68 S Ct 1049.

In Sanders v United States, 373 US 1, 10 L Ed 2d 148, 83 S Ct 1068 (1963), the Court crystallized the various factors bearing on a district court's discretion to entertain a successive petition.[1] The Court in Sanders distinguished successive petitions raising previously asserted grounds from those raising previously unasserted grounds. With regard to the former class of petitions, the Court explained, the district court may give "[c]ontrolling weight . . . to [the] denial of a prior application" unless "the ends of justice would . . . be served by reaching the merits of the subsequent application." Id., at 15, 10 L Ed 2d 148, 83 S Ct 1068. With regard to the

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latter, however, the district court *must* reach the merits of the petition *unless* "there has been an abuse of the writ . . . ." Id., at 17, 10 L Ed 2d 148, 83 S Ct 1068. In determining whether the omission of the claim from the previous petition constitutes an abuse of the writ, the judgment of the district court is to be guided chiefly by the " '[equitable] principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.' " Ibid., quoting Fay v Noia, 372 US 391, 438, 9 L Ed 2d 837, 83 S Ct 822 (1963).

> "Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the with-

1. Although Sanders examined the abuse-of-the-writ question in the context of a motion for collateral review filed under 28 USC § 2255 [28 USCS § 2255], the Court made it clear that the same principles apply in the context of a petition for habeas corpus filed under 28 USC § 2254 [28 USCS § 2254]. See 373 US, at 12-15, 10 L Ed 2d 148, 83 S Ct 1068.

held ground. The same may be true if, as in Wong Doo, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." 373 US, at 18, 10 L Ed 2d 148, 83 S Ct 1068.

What emerges from Sanders and its predecessors is essentially a good-faith standard. As illustrated by Wong Doo, the principal form of bad faith that the "abuse of the writ" doctrine is intended to deter is the deliberate abandonment of a claim the factual and legal basis of which are known to the petitioner (or his counsel) when he files his first petition. The Court in Sanders stressed this point by equating its analysis with that of Fay v Noia, supra, which established the then-prevailing "deliberate bypass" test for the cognizability of claims on which a petitioner procedurally defaulted in state proceedings. See 373 US, at 18, 10 L Ed 2d 148, 83 S Ct 1068. A petitioner also abuses the writ under Sanders when he uses the writ to achieve some end other than expeditious relief from unlawful confinement—such as "to vex, harass, or delay." However, so long

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as the petitioner's previous application was based on a good-faith assessment of the claims available to him, see Price v Johnston, supra, at 289, 92 L Ed 1356, 68 S Ct 1049; Wong Doo, supra, at 241, 68 L Ed 999, 44 S Ct 524; the denial of the application does not bar the petitioner from availing himself of "new or additional information," Price v Johnston, supra, at 290, 92 L Ed 1356, 68 S Ct 1049, in support of a claim not previously raised. Accord, Advisory Committee's Note to Habeas Corpus Rule 9, 28 USC, p 427 [USCS Court Rules, § 2254 Rules, Note following Rule 9].

"Cause and prejudice"—the standard currently applicable to procedural defaults in state proceedings, see Wainwright v Sykes, 433 US 72, 53 L Ed 2d 594, 97 S Ct 2497 (1977)—imposes a much stricter test. As this Court's precedents make clear, a petitioner has *cause* for failing effectively to present his federal claim in state proceedings only when "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule . . . ." Murray v Carrier, 477 US 478, 488, 91 L Ed 2d 397, 106 S Ct 2639 (1986). Under this test, the state of mind of counsel is largely irrelevant. Indeed, this Court has held that even counsel's *reasonable* perception that a particular claim is without factual or legal foundation does not excuse the failure to raise that claim in the absence of an objective, external impediment to counsel's efforts. See Smith v Murray, 477 US 527, 535-536, 91 L Ed 2d 434, 106 S Ct 2661 (1986). In this sense, the cause component of the Wainwright v Sykes test establishes a *strict-liability* standard.[2]

2. Contrary to the majority's suggestion, this Court's more recent decisions on abuse of the writ by no means foreshadowed the shift to Sykes' strict-liability standard. The cases cited by the majority all involved eleventh-hour dispositions of capital stay applications, and the cursory analysis in each ruling suggests merely that the habeas petitioner failed to carry his burden of articulating a credible explanation for having failed to raise the claim in an earlier petition. See Advisory Committee's Note to Habeas Corpus Rule 9,

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Equally foreign to our abuse-of-the-writ jurisprudence is the requirement that a petitioner show "prejudice." Under Sanders, a petitioner who articulates a justifiable reason for failing to present a claim in a previous habeas application is not required in addition to demonstrate any particular degree of prejudice before the habeas court must consider his claim. If the petitioner demonstrates that his claim has merit, it is the State that must show that the resulting constitutional error was harmless beyond a reasonable doubt. See L. Yackle, Postconviction Remedies § 133, p 503 (1981).[3]

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II

The real question posed by the majority's analysis is not *whether* the cause-and-prejudice test departs from the principles of Sanders—for it clearly does—but whether the majority has succeeded in *justifying* this departure as an exercise of this Court's common-lawmaking discretion. In my view, the majority does not come close to justifying its new standard.

A

Incorporation of the cause-and-prejudice test into the abuse-of-the-writ doctrine cannot be justified as an exercise of this Court's common-lawmaking discretion, because this Court has no discretion to exercise in this area. Congress has affirmatively ratified the Sanders good-faith standard in the governing statute and procedural rules, thereby insu-

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28 USC, p 427 [USCS Court Rules, § 2254 Rules, Note following Rule 9] ("[T]he petitioner has the burden of proving that he has not abused the writ"); accord, Price v Johnston, 334 US 266, 292, 92 L Ed 1356, 68 S Ct 1049 (1948); see also Sanders v United States, 373 US 1, 10, 10 L Ed 2d 148, 83 S Ct 1068 (1963) (Government merely has burden to plead abuse of the writ). Thus, in Woodard v Hutchins, 464 US 377, 78 L Ed 2d 541, 104 S Ct 752 (1984) (per curiam), the five Justices concurring in the order concluded that the habeas petitioner had abused the writ because he "offer[ed] *no explanation* for having failed to raise [three new] claims in his first petition for habeas corpus." Id., at 379, 78 L Ed 2d 541, 104 S Ct 752 (Powell, J., joined by Burger, C. J., Blackmun, Rehnquist, and O'Connor, JJ., concurring in order vacating stay) (emphasis added). A petitioner who gives no explanation for omitting his claims from a previous application necessarily fails to carry his burden of justification. Similarly, in Antone v Dugger, 465 US 200, 79 L Ed 2d 147, 104 S Ct 962 (1984) (per curiam), the Court rejected as "meritless" the petitioner's claim that the imminence of his execution prevented his counsel from identifying all of the claims that could be raised in the first petition, because the petitioner's execution had in fact been stayed during the pendency of the original habeas proceeding. Id., at 206, n 4, 79 L Ed 2d 147, 104 S Ct 962. Finally, in Delo v Stokes, 495 US 320, 109 L Ed 2d 325, 110 S Ct 1880 (1990) (per curiam), the Court in a five-sentence analysis concluded that the petitioner had abused the writ by raising a claim the legal basis of which was readily apparent at the time of the first petition. Id., at 321-322, 109 L Ed 2d 325, 110 S Ct 1880. The opinion says nothing about whether the petitioner offered any explanation to rebut the presumption that the petitioner had deliberately abandoned this claim. In short, the analysis in these decisions is as consistent with Sanders' deliberate-abandonment test as with Sykes' cause-and-prejudice test.

3. The majority is simply incorrect, moreover, when it claims that the "prejudice" component of the Sykes test is "[w]ell defined in the case law." Ante, at 496, 113 L Ed 2d, at 546. The Court in Sykes expressly declined to define this concept, see 433 US, at 91, 53 L Ed 2d 594, 97 S Ct 2497, and since then, the Court has elaborated upon "prejudice" only as it applies to nonconstitutional jury-instruction challenges, leaving "the import of the term in other situations . . . an open question." United States v Frady, 456 US 152, 168, 71 L Ed 2d 816, 102 S Ct 1584 (1982). Thus, far from resolving "confusion" over the proper application of the abuse-of-the-writ doctrine, today's decision creates it.

lating that standard from judicial repeal.

The abuse-of-the-writ doctrine is embodied in 28 USC § 2244(b) [28 USCS § 2244(b)] and in Habeas Corpus Rule 9(b). Enacted three years after Sanders, § 2244(b) recodified the statutory authority of a district court to dismiss a second or successive petition, amending the statutory language to incorporate the Sanders criteria:

> "[A] subsequent application for a writ of habeas corpus . . . need not be entertained by a court . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." 28 USC § 2244(b) [28 USCS § 2244(b)].

Consistent with Sanders, the purpose of the recodification was to spare a district court the obligation to entertain a petition "containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds *obviously well known to [the petitioner] when [he]*

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filed the preceding application." S Rep No. 1797, 89th Cong, 2d Sess, 2 (1966) (emphasis added). Rule 9(b) likewise adopts Sanders' terminology:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

There can be no question that § 2244(b) and Rule 9(b) codify Sanders. The legislative history of, and Advisory Committee's Notes to, Rule 9(b) expressly so indicate, see 28 USC, pp 426-427 [USCS Court Rules, § 2254 Rules, Notes following Rule 9], HR Rep No. 94-1471, pp 5-6 (1976), and such has been the universal understanding of this Court, see Rose v Lundy, 455 US 509, 521, 71 L Ed 2d 379, 102 S Ct 1198 (1982), of the lower courts, see, e. g., Williams v Lockhart, 862 F2d 155, 157 (CA8 1988); Neuschafer v Whitley, 860 F2d 1470, 1474 (CA9 1988), cert denied, sub nom Demosthenes v Neuschafer, 493 US 906, 107 L Ed 2d 214, 110 S Ct 264 (1989); 860 F2d, at 1479 (Alarcon, J., concurring in result); Davis v Dugger, 829 F2d 1513, 1518, n 13 (CA11 1987); Passman v Blackburn, 797 F2d 1335, 1341 (CA5 1986), cert denied, 480 US 948, 94 L Ed 2d 794, 107 S Ct 1609 (1987); United States v Talk, 597 F2d 249, 250-251 (CA10 1979); United States ex rel. Fletcher v Brierley, 460 F2d 444, 446, n 4A (CA3), cert denied, 409 US 1044, 34 L Ed 2d 496, 93 S Ct 543 (1972), and of commentators, see, e. g., 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4267, pp 477-478 (2d ed 1988); L. Yackle, supra, § 154.[4]

4. In this respect, the abuse-of-the-writ doctrine rests on a different foundation from the procedural-default doctrine. In Wainwright v Sykes, 433 US 72, 53 L Ed 2d 594, 97 S Ct 2497 (1977), the Court emphasized that the procedural-default rule set down in Fay v Noia, 372 US 391, 9 L Ed 2d 837, 83 S Ct 822 (1963), derived only from "comity" considerations, 433 US, at 83, 53 L Ed 2d 594, 97 S Ct 2497, and explained that the content of this

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The majority concedes that § 2244(b) and Rule 9(b) codify Sanders, see ante, at 487, 113 L Ed 2d, at 540, but concludes nonetheless that Congress did "not answer" all of the "questions" concerning the abuse-of-the-writ doctrine, ibid. The majority emphasizes that § 2244(b) refers to second or successive petitions from petitioners who have "deliberately withheld the newly asserted ground . . . *or otherwise abused the writ*" without exhaustively cataloging the ways in which the writ may "otherwise" be "abused." See ante, at 486, 489-490, 113 L Ed 2d, at 539, 541-542. From this "silenc[e]," the majority infers a congressional delegation of lawmaking power broad enough to encompass the engrafting of the cause-and-prejudice test onto the abuse-of-the-writ doctrine. Ante, at 487, 113 L Ed 2d, at 540.

It is difficult to take this reasoning seriously. Because "cause" under Sykes makes the mental state of the petitioner (or his counsel) irrelevant, "cause" completely subsumes "deliberate abandonment." See Engle v Isaac, 456 US 107, 130, n 36, 71 L Ed 2d 783, 102 S Ct 1558 (1982); see also Wainwright v Sykes, 433 US, at 87, 53 L Ed 2d 594, 97 S Ct 2497. Thus, if merely failing to raise a claim without "cause"—that is, without some external impediment to raising it—necessarily constitutes an abuse of the writ, the statutory reference to *deliberate* withholding of a claim would be rendered superfluous. Insofar as Sanders was primarily concerned with limiting dismissal of a second or subsequent petition to instances in which the petitioner had deliberately abandoned the new claim, see 373 US, at 18, 10 L Ed 2d 148, 83 S Ct 1068, the suggestion that Congress invested courts with the discretion to read this language out of the statute is completely irreconcilable with the proposition that § 2244(b) and Rule 9(b) codify Sanders.

To give content to "otherwise abus[e] the writ" as used in § 2244(b), we must look to Sanders. As I have explained,

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the Court in Sanders identified two broad classes of bad-faith conduct that bar adjudication of a claim not raised in a previous habeas application: the deliberate abandonment or withholding of that claim from the first petition; and the filing of a petition aimed at some purpose other than expeditious relief from unlawful confinement, such as "to vex, harass, or delay." See ibid. By referring to second or successive applications from habeas petitioners who have "deliberately withheld the newly asserted ground *or* otherwise abused the writ," § 2244(b) tracks this division. Congress may well have selected the phrase "otherwise abused the writ" with the expectation that courts would continue to elaborate upon the types of dilatory tactics that, in addition to deliberate abandonment of a known claim, constitute an abuse of the writ. But consistent with Congress' intent to codify San-

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doctrine is therefore subject to the Court's traditional, common-law discretion "to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged," id., at 81, 53 L Ed 2d 594, 97 S Ct 2497. But unlike Fay v Noia's "deliberate bypass" test for procedural defaults, the "deliberate abandonment" test of Sanders has been expressly ratified by Congress. This legislative action necessarily constrains the scope of this Court's common-lawmaking discretion.

ders' good-faith test, such elaborations must be confined to circumstances in which a petitioner's omission of an unknown claim is conjoined with his *intentional* filing of a petition for an improper purpose, such as "to vex, harass or delay."

The majority tacitly acknowledges this constraint on the Court's interpretive discretion by suggesting that "cause" is tantamount to "inexcusable neglect." This claim, too, is untenable. The majority exaggerates when it claims that the "inexcusable neglect" formulation—which this Court has never applied in an abuse-of-the-writ decision—functions as an independent standard for evaluating a petitioner's failure to raise a claim in a previous habeas application. It is true that Sanders compared its own analysis to the analysis in Townsend v Sain, 372 US 293, 9 L Ed 2d 770, 83 S Ct 745 (1963), which established that a district court should deny an evidentiary hearing if the habeas petitioner inexcusably neglected to develop factual evidence in state proceedings. See id., at 317, 9 L Ed 2d 770, 83 S Ct 745. Townsend, however, expressly equated "inexcusable neglect" with the "deliberate bypass" test of Fay v Noia. See 372 US, at

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317, 9 L Ed 2d 770, 83 S Ct 745.[5] But even if "inexcusable neglect" does usefully describe a class of abuses separate from deliberate abandonment, the melding of "cause and prejudice" into the abuse-of-the-writ doctrine cannot be defended as a means of "giving content" to "inexcusable neglect." Ante, at 490, 113 L Ed 2d, at 542. For under Sykes' strict-liability standard, mere attorney negligence is *never* excusable. See Murray v Carrier, 477 US, at 488, 91 L Ed 2d 397, 106 S Ct 2639 ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . , we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default").

Confirmation that the majority today exercises legislative power not properly belonging to this Court is supplied by Congress' own recent consideration and rejection of an amendment to § 2244(b). It is axiomatic that this Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes. See Bowsher v Merck & Co. 460 US 824, 837, n 12, 75 L Ed 2d 580, 103 S Ct 1587 (1983); FTC v Ruberoid Co. 343 US 470, 478-479, 96 L Ed 1081, 72 S Ct 800 (1952); see also North Haven Bd. of Ed. v Bell, 456 US 512, 534-535, 72 L Ed 2d 299, 102 S Ct 1912 (1982). Yet that is exactly the effect of today's decision. As reported out of the House Committee on the Judiciary, § 1303 of HR 5269, 101st Cong, 2d Sess (1990), would have required dismissal of any second or subsequent application by a habeas peti-

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5. Indeed, Congress expressly amended Rule 9(b) to eliminate language that would have established a standard similar to "inexcusable neglect." As initially submitted to Congress, Rule 9(b) would have authorized a district court to entertain a second or successive petition raising a previously unasserted ground unless the court "finds that the failure of the petitioner to assert th[at] groun[d] in a prior petition is *not excusable.*" HR Rep No. 94-1471, p 8 (1976) (emphasis added). Explaining that "the 'not excusable' language [would] creat[e] a new and undefined standard that [would] g[ive] a judge too broad a discretion to dismiss a second or successive petition," Congress substituted Sanders' "abuse of the writ" formulation. See id., at 5. This amendment was designed to "brin[g] Rule 9(b) into conformity with existing law." Ibid.

tioner under sentence of death unless the petitioner

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raised a new claim "the factual basis of [which] could not have been discovered by *the exercise of reasonable diligence,*" HR Rep No. 101-681, pt 1, p 29 (1990) (emphasis added).[6] The Committee Report accompanying this legislation explained that "courts have properly construed section 2244(b) and Rule 9(b) as codifications of the guidelines the [Supreme] Court itself prescribed in Sanders." Id., at 119 (citation omitted). The Report justified adoption of the tougher "reasonable diligence" standard on the ground that "[t]he Sanders guidelines have not . . . satisfactorily met concerns that death row prisoners may file second or successive habeas corpus applications as a means of extending litigation." Ibid. Unfazed by Congress' rejection of this legislation, the majority arrogates to itself the power to repeal Sanders and to replace it with a tougher standard.[7]

B

Even if the fusion of cause-and-prejudice into the abuse-of-the-writ doctrine were not foreclosed by the will of Congress, the majority fails to demonstrate that such a rule would be a wise or just exercise of the Court's common-lawmaking discretion. In fact, the majority's abrupt change in law subverts the policies underlying § 2244(b) and unfairly prejudices the petitioner in this case.

The majority premises adoption of the cause-and-prejudice test almost entirely on the importance of "finality." See ante, at 490-493, 113 L Ed 2d, at 542-544. At best, this is an insufficiently developed justification for cause-and-prejudice or any other possible conception of the abuse-of-the-writ doctrine. For the very

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essence of the Great Writ is our criminal justice system's commitment to suspending "[c]onventional notions of finality of litigation . . . where life or liberty is at stake and infringement of constitutional rights is alleged." Sanders, 373 US, at 8, 10 L Ed 2d 148, 83 S Ct 1068. To recognize this principle is not to make the straw-man claim that the writ must be accompanied by " '[a] procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude.' " Ante, at 492, 113 L Ed 2d, at 543, quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv L Rev 441, 452 (1963). Rather, it is only to point out the plain fact that we may not, "[u]nder the guise of fashioning a procedural rule, . . . wip[e] out the practical efficacy of a jurisdiction conferred by Congress on the District Courts." Brown v Allen, 344 US 443, 498-499, 97 L Ed 469, 73 S Ct 397 (1953) (opinion of Frankfurter, J.).

The majority seeks to demonstrate that cause-and-prejudice strikes an acceptable balance between the state's interest in finality and the purposes of habeas corpus by analo-

6. House bill 5269 was the House version of the legislation that became the Crime Control Act of 1990, Pub L 101-647, 104 Stat 4789 the final version of which left § 2244(b) unamended.

7. Moreover, the rejected amendment to § 2244(b) would have changed the standard only for second or subsequent petitions filed by petitioners under a sentence of death, leaving the Sanders standard intact for noncapital petitioners. The majority's decision today changes the standard for *all* habeas petitioners.

gizing the abuse-of-the-writ doctrine to the procedural-default doctrine. According to the majority, these two doctrines "implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review." Ante, at 490-491, 113 L Ed 2d, at 542. And because this Court has already deemed cause-and-prejudice to be an appropriate standard for assessing procedural defaults, the majority reasons, the same standard should be used for assessing the failure to raise a claim in a previous habeas petition. See ante, at 490-493, 113 L Ed 2d, at 542-545.

This analysis does not withstand scrutiny. This Court's precedents on the procedural-default doctrine identify two purposes served by the cause-and-prejudice test. The first purpose is to promote respect for a State's legitimate procedural rules. See, e. g., Reed v Ross, 468 US 1, 14, 82 L Ed 2d 1, 104 S Ct 2901 (1984); Sykes, 433 US, at 87-90, 53 L Ed 2d 594, 97 S Ct 2497. As the Court has explained, the willingness of a habeas court to entertain a claim that a state court has deemed to be procedurally barred "undercut[s] the

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State's ability to enforce its procedural rules," Engle v Isaac, 456 US, at 129, 71 L Ed 2d 783, 102 S Ct 1558, and may cause "state courts themselves [to be] less stringent in their enforcement," Sykes, supra, at 89, 53 L Ed 2d 594, 97 S Ct 2497. See generally Meltzer, State Court Forfeitures of Federal Rights, 99 Harv L Rev 1128, 1150-1158 (1986). The second purpose of the cause-and-prejudice test is to preserve the connection between federal collateral review and the general "deterrent" function served by the Great Writ. " '[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.' " Teague v Lane, 489 US 288, 306, 103 L Ed 2d 334, 109 S Ct 1060 (1989) (plurality opinion), quoting Desist v United States, 394 US 244, 262-263, 22 L Ed 2d 248, 89 S Ct 1030 (1969) (Harlan, J., dissenting); see Rose v Mitchell, 443 US 545, 563, 61 L Ed 2d 739, 99 S Ct 2993 (1979). Obviously, this understanding of the disciplining effect of federal habeas corpus presupposes that a criminal defendant has given the state trial and appellate courts a fair opportunity to pass on his constitutional claims. See Murray v Carrier, 477 US, at 487, 91 L Ed 2d 397, 106 S Ct 2639; Engle v Isaac, supra, at 128-129, 71 L Ed 2d 783, 102 S Ct 1558. With regard to both of these purposes, the strictness of the cause-and-prejudice test has been justified on the ground that the defendant's procedural default is akin to an independent and adequate state-law ground for the judgment of conviction. See Sykes, supra, at 81-83, 53 L Ed 2d 594, 97 S Ct 2497.

Neither of these concerns is even remotely implicated in the abuse-of-the-writ setting. The abuse-of-the-writ doctrine clearly contemplates a situation in which a petitioner (as in this case) *has* complied with applicable state-procedural rules and effectively raised his constitutional claim in state proceedings; were it otherwise, the abuse-of-the-writ doctrine would not perform a screening function independent from that performed by the procedural-default doctrine and by the requirement that a habeas petitioner exhaust his state remedies, see 28 USC §§ 2254(b), (c) [28 USCS §§ 2254(b),

(c)]. Cf. ante, at 486-487, 113 L Ed 2d, at 539-540. Because the abuse-of-the-writ doctrine presupposes that the

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petitioner has effectively raised his claim in state proceedings, a decision by the habeas court to entertain the claim notwithstanding its omission from an earlier habeas petition will neither breed disrespect for state-procedural rules nor unfairly subject state courts to federal collateral review in the absence of a state-court disposition of a federal claim.[8]

Because the abuse-of-the-writ doctrine addresses the situation in which a federal habeas court must determine whether to hear a claim withheld from *another* federal habeas court, the test for identifying an abuse must strike an appropriate balance between finality and review in *that* setting. Only when informed by Sanders does § 2244(b) strike an efficient balance. A habeas petitioner's own interest in liberty furnishes a powerful incentive to assert in his first petition all claims that the petitioner (or his counsel) believes have a reasonable prospect for success. See Note, 83 Harv L Rev 1038, 1153-1154 (1970); see also Rose v Lundy, 455 US, at 520, 71 L Ed 2d 379, 102 S Ct 1198 ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims"). Sanders' bar on the later assertion of claims omitted in bad faith adequately fortifies this natural incentive. At the same time, however, the petitioner faces an effective *disincentive* to asserting any claim that he believes does not have a reasonable prospect for

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success: the adverse adjudication of such a claim will bar its reassertion under the successive-petition doctrine, see 28 USC § 2244(b) [28 USCS § 2244(b)]; Sanders, supra, at 17, 10 L Ed 2d 148, 83 S Ct 1068, whereas omission of the claim will not prevent the petitioner from asserting the claim for the first time in a later petition should the discovery of new evidence or the advent of intervening changes in law invest the claim with merit, S Rep No. 1797, at 2; Advisory Committee's Note to Habeas Corpus Rule 9, 28 USC, p 427 [USCS Court Rules, § 2254 Rules, Note following Rule 9].

The cause-and-prejudice test destroys this balance. By design, the cause-and-prejudice standard creates a near-irrebuttable presumption that omitted claims are permanently barred. This outcome not only conflicts with Congress' intent that a petitioner be free to avail himself of newly discovered evidence or intervening changes in law, S Rep No. 1797, at 2; Advisory Committee's Note to Habeas Corpus Rule 9, 28 USC, p 427 [USCS Court Rules,

8. Insofar as the habeas court's entertainment of the petitioner's claim in these circumstances depends on the petitioner's articulation of a justifiable reason for having failed to raise the claim in the earlier federal petition, see Sanders, 373 US, at 17-18, 10 L Ed 2d 148, 83 S Ct 1068; Price v Johnston, 334 US, at 291, 92 L Ed 1356, 68 S Ct 1049, the federal court may very well be considering the claim on the basis of evidence discovered after, or legal developments that postdate, the termination of the state proceedings. But the decision to permit a petitioner to avail himself of federal habeas relief under those conditions is one that Congress expressly made in authorizing district courts to entertain second or successive petitions under § 2244(b) and Rule 9(b). See S Rep No. 1797, at 2 ("newly discovered evidence" is basis for second petition raising previously unasserted ground); Advisory Committee's Note to Habeas Corpus Rule 9, 28 USC, p 427 [USCS Court Rules, § 2254 Rules, Note following Rule 9] ("A retroactive change in the law and newly discovered evidence are examples" of "instances in which petitioner's failure to assert a ground in a prior petition is excusable").

§ 2254 Rules, Note following Rule 9], but also subverts the statutory disincentive to the assertion of frivolous claims. Rather than face the cause-and-prejudice bar, a petitioner will assert all conceivable claims, whether or not these claims reasonably appear to have merit. The possibility that these claims will be adversely adjudicated and thereafter be barred from relitigation under the successive-petition doctrine will not effectively discourage the petitioner from asserting them, for the petitioner will have virtually no expectation that any withheld claim could be revived should his assessment of its merit later prove mistaken. Far from promoting efficiency, the majority's rule thus invites the very type of "baseless claims," ante, at 493, 113 L Ed 2d, at 544, that the majority seeks to avert.

The majority's adoption of the cause-and-prejudice test is not only unwise, but also manifestly unfair. The proclaimed purpose of the majority's new strict-liability standard is to increase to the maximum extent a petitioner's incentive to investigate all conceivable claims before filing his first petition. See ante, at 498, 113 L Ed 2d, at 547. Whatever its merits, this was *not* the rule when the petitioner *in this case* filed his first petition.

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From the legislative history of § 2244(b) and Rule 9(b) and from the universal agreement of courts and commentators, see supra, at 513, 113 L Ed 2d, at 557, McCleskey's counsel could have reached no other conclusion but that his investigatory efforts in preparing his client's petition would be measured against the Sanders good-faith standard. There can be little question that his efforts satisfied that test; indeed, the District Court expressly concluded that McCleskey's counsel on his first habeas conducted a reasonable and competent investigation before concluding that a claim based on Massiah v United States, 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199 (1964), would be without factual foundation. See App 84-85; see also infra, at 526, 113 L Ed 2d, at 566. Before today, that would have been enough. The Court's utter indifference to the injustice of retroactively applying its new, strict-liability standard to this habeas petitioner stands in marked contrast to this Court's eagerness to protect States from the unfair surprise of "new rules" that enforce the constitutional rights of citizens charged with criminal wrongdoing. See Butler v McKellar, 494 US 407, 412-414, 108 L Ed 2d 347, 110 S Ct 1212 (1990); Saffle v Parks, 494 US 484, 488, 108 L Ed 2d 415, 110 S Ct 1257 (1990); Teague v Lane, 489 US, at 299-310, 103 L Ed 2d 334, 109 S Ct 1060 (plurality opinion).

This injustice is compounded by the Court's activism in fashioning its new rule. The applicability of Sykes' cause-and-prejudice test was not litigated in either the District Court or the Court of Appeals. The additional question that we requested the parties to address reasonably could have been read to relate merely to the burden of proof under the abuse-of-the-writ doctrine;[9] it evidently did not put the parties on notice that

9. The question reads: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?" 496 US 904, 110 L Ed 2d 266, 110 S Ct 2585 (1990) (emphasis added).

this Court was contemplating a change in the governing legal standard, since respondent did not even mention Sykes or cause-and-prejudice in its brief or at oral

[499 US 523]

argument, much less request the Court to adopt this standard.[10] In this respect, too, today's decision departs from norms that inform the proper judicial function. See Heckler v Campbell, 461 US 458, 468, n 12, 76 L Ed 2d 66, 103 S Ct 1952 (1983) (Court will consider ground in support of judgment not raised below only in extraordinary case); accord, Granfinanciera, S. A. v Nordberg, 492 US 33, 39, 106 L Ed 2d 26, 109 S Ct 2782 (1989). It cannot be said that McCleskey had a fair opportunity to challenge the reasoning that the majority today invokes to strip him of his Massiah claim.

III

The manner in which the majority applies its new rule is as objectionable as the manner in which the majority creates that rule. As even the majority acknowledges, see ante, at 470, 113 L Ed 2d, at 529, the standard that it announces today is not the one employed by the Court of Appeals, which purported to rely on Sanders, see 890 F2d 342, 347 (CA11 1989). See ante, at 470, 113 L Ed 2d, at 529. Where, as here, application of a different standard from the one applied by the lower court requires an in-depth review of the record, the ordinary course is to remand so that the parties have a fair opportunity to address, and the lower court to consider, all of the relevant issues. See, e. g., Anderson v Liberty Lobby, Inc. 477 US 242, 257, 91 L Ed 2d 202, 106 S Ct 2505 (1986); Mandel v Bradley, 432 US 173, 179, 53 L Ed 2d 199, 97 S Ct 2238 (1977) (per curiam); see also United States v Hasting, 461 US 499, 515-518, 76 L Ed 2d 96, 103 S Ct 1974 (1983) (Stevens, J., concurring in judgment) (Court should not undertake record-review "function that can better be performed by other judges").

[499 US 524]

A remand would have been particularly appropriate in this case in view of the patent deficiencies in the reasoning of the Court of Appeals. The Court of Appeals concluded that McCleskey deliberately abandoned his Massiah claim because his counsel "made a knowing choice not to pursue the claim after having raised it" unsuccessfully on state collateral review. 890 F2d, at 349. This reasoning, which the majority declines to endorse, is obviously faulty. As I have explained, the abuse-of-the-writ doctrine is independent from the procedural-default and exhaustion doctrines; § 2244(b) and Rule 9(b) contemplate a habeas petitioner who has effectively presented his claim in state proceedings but withheld that claim from a previous habeas application. Because § 2244(b) and Rule 9(b) authorize the district court to consider such a claim under appropriate circumstances, it cannot be

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10. Petitioner McCleskey addressed the applicability of the cause-and-prejudice test only in his reply brief and in response to arguments raised by amicus curiae Criminal Justice Legal Foundation. It is well established, however, that this Court will not consider an argument advanced by amicus when that argument was not raised or passed on below and was not advanced in this Court by the party on whose behalf the argument is being raised. See United Parcel Service, Inc. v Mitchell, 451 US 56, 60, n 2, 67 L Ed 2d 732, 101 S Ct 1559 (1981); Bell v Wolfish, 441 US 520, 531, n 13, 60 L Ed 2d 447, 99 S Ct 1861 (1979); Knetsch v United States, 364 US 361, 370, 5 L Ed 2d 128, 81 S Ct 132 (1960).

the case that a petitioner invariably abuses the writ by consciously failing to include in his first habeas petition a claim raised in state proceedings. Insofar as Congress intended that the district court excuse the withholding of a claim when the petitioner produces newly discovered evidence or intervening changes in law, S Rep No. 1797, at 2; Advisory Committee's Note to Habeas Corpus Rule 9, 28 USC, p 427 [USCS Court Rules, § 2254 Rules, Note following Rule 9], a petitioner cannot be deemed to have deliberately abandoned the claim in an earlier habeas proceeding unless the petitioner was aware *then* of the evidence and law that support the claim. See, e. g., Wong Doo, 265 US, at 241, 68 L Ed 999, 44 S Ct 524. If the Court of Appeals had properly applied Sanders, it would almost certainly have agreed with the District Court's conclusion that McCleskey was *not* aware of the evidence that supported his Massiah claim when he filed his first petition. In any case, because the Court of Appeals' reversal was based on an erroneous application of Sanders, the majority's decision not to remand cannot be justified on the ground that the Court of Appeals would necessarily have decided the case the same way under the cause-and-prejudice standard.

[499 US 525]

Undaunted by the difficulty of applying its new rule without the benefit of any lower court's preliminary consideration, the majority forges ahead to perform its own independent review of the record. The majority concludes that McCleskey had no cause to withhold his Massiah claim because all of the evidence supporting that claim was available before he filed his first habeas petition. The majority purports to accept the District Court's finding that Offie Evans' 21-page statement was, at that point, being held beyond McCleskey's reach. See ante, at 498, 113 L Ed 2d, at 547-548, and n.[11] But the State's failure to produce this document, the majority explains, furnished no excuse for McCleskey's failure to assert his Massiah claim "because McCleskey participated in the conversations reported by Evans," and therefore "knew everything in the document that the District Court relied upon to establish the ab initio connection between Evans and the police." Ante,at 500, 113 L Ed 2d, at 548. The majority also points out that no

[499 US 526]

external force impeded McCleskey's

11. Nonetheless, "for the sake of completeness," the majority feels constrained to express its opinion that "this finding is not free from substantial doubt." Ante, at 498, n, 113 L Ed 2d, at 547. Pointing to certain vague clues arising at different points during the state proceedings at trial and on direct and collateral review, the majority asserts that "[t]he record . . . furnishes strong evidence that McCleskey knew or should have known of the Evans document before the first federal petition." Ante, at 499, n, 113 L Ed 2d, at 548. It is the majority's account, however, that is incomplete. Omitted is any mention of the State's evasions of counsel's repeated attempts to compel disclosure of any statement in the State's possession. In particular, the majority neglects to mention the withholding of the statement from a box of documents produced during discovery in McCleskey's state collateral-review action; these documents were represented to counsel as comprising "*a complete copy* of the prosecutor's file resulting from the criminal prosecution of Warren McCleskey in Fulton County." App 29 (emphasis added). McCleskey ultimately obtained the statement by filing a request under a state "open records" statute that was not construed to apply to police-investigative files until six years after McCleskey's first federal habeas proceeding. See generally Napper v Georgia Television Co., 257 Ga 156, 356 SE2d 640 (1987). This fact, too, is missing from the majority's account.

discovery of the testimony of jailer Worthy. See ibid.

To appreciate the hollowness—and the dangerousness—of this reasoning, it is necessary to recall the District Court's central finding: that the State *did* covertly plant Evans in an adjoining cell for the purpose of eliciting incriminating statements that could be used against McCleskey at trial. See App 83. Once this finding is credited, it follows that the State affirmatively misled McCleskey and his counsel throughout their unsuccessful pursuit of the Massiah claim in state collateral proceedings and their investigation of that claim in preparing for McCleskey's first federal habeas proceeding. McCleskey's counsel deposed or interviewed the assistant district attorney, various jailers, and other government officials responsible for Evans' confinement, all of whom denied any knowledge of an agreement between Evans and the State. See App 25-28, 44-47, 79, 85.

Against this background of deceit, the State's withholding of Evans' 21-page statement assumes critical importance. The majority overstates McCleskey's and his counsel's awareness of the statement's contents. For example, the statement relates that state officials were present when Evans made a phone call at McCleskey's request to McCleskey's girlfriend, Plaintiff's Exh 8, p 14, a fact that McCleskey and his counsel had no reason to know and that strongly supports the District Court's finding of an ab initio relationship between Evans and the State. But in any event, the importance of the statement lay much less in what the statement said than in its simple *existence*. Without the statement, McCleskey's counsel had nothing more than his client's testimony to back up counsel's own suspicion of a possible Massiah violation; given the state officials' adamant denials of any arrangement with Evans, and given the state habeas court's rejection of the Massiah claim, counsel quite reasonably concluded that raising this claim in McCleskey's first habeas petition would be futile. All this changed once

[499 US 527]

counsel finally obtained the statement, for at that point, there was credible, independent corroboration of counsel's suspicion. This additional evidence not only gave counsel the reasonable expectation of success that had previously been lacking, but also gave him a basis for conducting further investigation into the underlying claim. Indeed, it was by piecing together the circumstances under which the statement had been transcribed that McCleskey's counsel was able to find Worthy, a state official who was finally willing to admit that Evans had been planted in the cell adjoining McCleskey's.[12]

The majority's analysis of this case is dangerous precisely because it treats as irrelevant the effect that

12. The majority gratuitously characterizes Worthy's testimony as being contradictory on the facts essential to McCleskey's Massiah claim. See ante, at 475, 113 L Ed 2d, at 532. According to the District Court—which is obviously in a better position to know than is the majority—"Worthy never wavered from the fact that someone, at some point, requested his permission to move Evans to be near McCleskey." App 78; accord id., at 81 ("The fact that someone, at some point, requested his permission to move Evans is the one fact from which Worthy never wavered in his two days of direct and cross-examination. The state has introduced no affirmative evidence that Worthy is either lying or mistaken").

the State's disinformation strategy had on counsel's assessment of the reasonableness of pursing the Massiah claim. For the majority, all that matters is that no external obstacle barred McCleskey from finding Worthy. But obviously, counsel's decision even to look for evidence in support of a particular claim has to be informed by what counsel reasonably perceives to be the prospect that the claim may have merit; in this case, by withholding the 21-page statement and by affirmatively misleading counsel as to the State's involvement with Evans, state officials created a climate in which McCleskey's first habeas counsel was perfectly justified in focusing his attentions elsewhere. The sum and substance of the majority's analysis is that McCleskey had no "cause" for failing to assert the Massiah claim because he did not try

[499 US 528]

hard enough to pierce the State's veil of deception. Because the majority excludes from its conception of cause any recognition of how state officials can distort a petitioner's reasonable perception of whether pursuit of a particular claim is worthwhile, the majority's conception of "cause" creates an incentive for state officials to engage in this very type of misconduct.

Although the majority finds it unnecessary to reach the question whether McCleskey was "prejudiced" by the Massiah violation in this case, I have no doubt that the admission of Evans' testimony at trial satisfies any fair conception of this prong of the Sykes test. No witness from the furniture store was able to identify which of the four robbers shot the off-duty police officer. The State did put on evidence that McCleskey had earlier stolen the pearl-handled pistol that was determined to be the likely murder weapon, but the significance of this testimony was clouded by a codefendant's admission that he had been carrying this weapon for weeks at a time, App 16, and by a prosecution witness' own prior statement that she had seen only the codefendant carry the pistol, id., at 11-14. See also id., at 89 (District Court finding that "the evidence on [McCleskey's] possession of the gun in question was conflicting"). Outside of the self-serving and easily impeachable testimony of the codefendant, the *only* evidence that directly supported the State's identification of McCleskey as the triggerman was the testimony of Evans. As the District Court found, "Evans' testimony about the petitioner's incriminating statements was critical to the state's case." Id., at 89. Without it, the jury might very well have reached a different verdict.

Thus, as I read the record, McCleskey should be entitled to the consideration of his petition for habeas corpus even under the cause-and-prejudice test. The case is certainly close enough to warrant a remand so that the issues can be fully and fairly briefed.

[499 US 529]

IV

Ironically, the majority seeks to defend its doctrinal innovation on the ground that it will promote respect for the "rule of law." Ante, at 492, 113 L Ed 2d, at 544. Obviously, respect for the rule of law must start with those who are responsible for *pronouncing* the law. The majority's invocation of "'the orderly administration of justice,'" ante, at 496, 113 L Ed 2d, at 546, rings hollow when the majority itself tosses aside established precedents

without explanation, disregards the will of Congress, fashions rules that defy the reasonable expectations of the persons who must conform their conduct to the law's dictates, and applies those rules in a way that rewards state misconduct and deceit. Whatever "abuse of the writ" today's decision is designed to avert pales in comparison with the majority's own abuse of the norms that inform the proper judicial function.

I dissent.

EASTERN AIRLINES, INC. v FLOYD

(1991) 499 US 530, 113 L Ed 2d 569, 111 S Ct 1489

[499 US 530]

EASTERN AIRLINES, INC., Petitioner

v

ROSE MARIE FLOYD, et vir, et al.

499 US 530, 113 L Ed 2d 569, 111 S Ct 1489

[No. 89-1598]

Argued October 29, 1990. Decided April 17, 1991.

Decision: Article 17 of Warsaw Convention held not to allow recovery for mental injury which is unaccompanied by physical injury.

SUMMARY

Under Article 17 of the 1929 treaty on international air transportation known as the Warsaw Convention, a carrier is liable for damages sustained through the accident of the carrier in the event of a passenger's death, wounding, or other "bodily injury" (which term is a translation of the term "lésion corporelle" in the authentic French text). Both the United States and the Bahamas adhere to the Warsaw Convention. In 1983, shortly after a passenger airplane's takeoff from Miami on a flight bound for the Bahamas, all three engines lost oil pressure. As the airplane began losing altitude rapidly, the passengers were informed that the airplane would be ditched in the Atlantic Ocean. One engine was eventually restarted, and the airplane landed safely in Miami. A group of passengers on the flight, each of whom claimed damages solely for mental distress, brought separate actions against the carrier. The United States District Court for the Southern District of Florida, in a consolidated proceeding, dismissed all claims, including a claim for recovery under the Warsaw Convention. With respect to such claim, the District Court ruled that the carrier was not liable because mental anguish alone was not compensable under Article 17 (629 F Supp 307). On appeal, the United States Court of Appeals for the Eleventh Circuit, reversing, held that the Warsaw Convention provided recovery for a passenger's purely emotional injuries unaccompanied by physical injury because the term "lésion corporelle," as used in Article 17, encompassed purely emotional distress (872 F2d 1462).

On certiorari, the United States Supreme Court reversed. In an opinion by MARSHALL, J., expressing the unanimous view of the court, it was held

SUBJECT OF ANNOTATION

Beginning on page 806, infra

Supreme Court's construction and application of Warsaw Convention (49 Stat 3000 et seq.), pertaining to international air transportation

Briefs of Counsel, p 804, infra.

that Article 17 did not allow recovery by passengers for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury, because (1) French-English dictionaries suggested that a proper translation of the term "lésion corporelle" was "bodily injury," and such translation accorded with the wording used in the two main translations of the Convention in English; (2) none of the applicable French legal sources available in 1929—including legislation, judicial decisions, and scholarly writing—indicated that "lésion corporelle" should be translated other than as "bodily injury"; (3) the inference that by its structure, Article 17 does not exclude any particular category of damages—although plausible—was not otherwise supported; (4) translating "lésion corporelle" as "bodily injury" was consistent with the negotiating history of the Convention; (5) there was no evidence that the drafters or signatories of the Convention specifically considered liability for psychic injury or the meaning of "lésion corporelle"; (6) a narrow reading of "lésion corporelle" as excluding purely mental injuries was consistent with (a) the primary purpose of the contracting parties to the Convention, namely, to limit the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry, and (b) the secondary goal of the Convention, namely, to establish among the signatories uniform rules and procedures governing documentation and claims arising out of international transportation; and (7) such narrow reading was also supported by the post-1929 conduct and interpretations of the signatories to the Convention.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Aeronautics and Space § 3; Treaties §§ 10.5, 12, 13, 13.5, 14, 19, 21 — Warsaw Convention — air carriers' liability for passengers' purely mental injuries — construction of "lésion corporelle"

1a-1f. Article 17 of the 1929 Warsaw Convention—which provides that an international air carrier is liable for damages sustained through the accident of the carrier in the event of a passenger's death, wounding, or any other "bodily injury" (which term is a translation of the term "lésion corporelle" in the authentic French text)—does not allow recovery by passengers for mental or psychic injuries unaccompanied by

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8 Am Jur 2d, Aviation § 118

4 Federal Procedure, L Ed, Aviation and Space § 7:595

3 Federal Procedural Forms, L Ed, Aviation and Space § 7:185

4 Am Jur Pl & Pr Forms (Rev), Aviation, Form 151

USCS Conventions, Warsaw Convention

L Ed Digest, Aeronautics and Space § 3; Treaties § 19

L Ed Index, Aviation; Fright, Shock, and Mental Anguish; Treaties

Index to Annotations, Aviation; Emotional Injury; Treaties; Warsaw Convention

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Treaty or international executive agreement as limiting recovery available to United States citizens or businesses—Supreme Court cases. 80 L Ed 2d 871.

Limitation of liability of air carrier for personal injury or death. 91 ALR Fed 547.

Right of airline employee to invoke liability limitations of Warsaw Convention as defense. 38 ALR Fed 949.

Liability under Warsaw Convention (49 Stat 3000 et seq.) of international air carrier for death or injury of passenger sustained in airport terminal during course of terrorist attack. 36 ALR Fed 490.

Liability of air carrier for damage or injury sustained by passenger as result of hijacking. 72 ALR3d 1299.

physical injury or physical manifestation of injury, because (1) French-English dictionaries suggest that a proper translation of the term "lésion corporelle" is "bodily injury," and such translation accords with the wording used in the two main translations of the Convention in English, by the United States Senate when it ratified the Convention and by the United Kingdom; (2) none of the applicable French legal sources available in 1929—including legislation, judicial decisions, and scholarly writing—indicates that "lésion corporelle" should be translated other than as "bodily injury," which term has a narrow meaning excluding purely mental injuries; (3) the inference that by its structure, Article 17 does not exclude any particular category of damages—although plausible—is not otherwise supported; (4) translating "lésion corporelle" as "bodily injury" is consistent with the negotiating history of the Convention, during which an international conference which preceded the Warsaw conference first agreed on an article which would have held carriers liable for accidents generally, but subsequently adopted the narrower provision on damages for passenger injuries which eventually became Article 17; (5) there is no evidence that the drafters or signatories of the Convention specifically considered liability for psychic injury or the meaning of "lésion corporelle"; (6) a narrow reading of "lésion corporelle" as excluding purely mental injuries is consistent with (a) the primary purpose of the contracting parties to the Convention, namely, to limit the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry, and (b) the secondary goal of the Convention, namely, to establish among the signatories uniform rules and procedures governing documentation and claims arising out of international transportation; and (7) such narrow reading is also supported by the post-1929 conduct and interpretations of the signatories to the Convention.

[See annotation p 806, infra]

Treaties §§ 10, 12, 13, 13.5, 14, 21 — construction — negotiation

2. When interpreting a treaty, the United States Supreme Court begins with the text of the treaty and the context in which the written words are used, but other general rules of construction may be brought to bear on difficult or ambiguous passages; treaties are construed more liberally than private agreements, and to ascertain their meaning the Supreme Court may look behind the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.

Treaties § 20 — Warsaw Convention — French text

3. In analyzing the Warsaw Convention, the United States Supreme Court must be guided by the French text, which text is the only authentic one.

[See annotation p 806, infra]

Appeal § 1331.5 — question reviewable

4. On certiorari to review a United States Court of Appeals decision involving the question whether, under Article 17 of the Warsaw Convention, passengers can recover from an international air carrier for mental distress when an accident has not caused death, physical injury, or physical manifestation of injury, the United States Supreme Court will express no view as to whether passengers can recover under Article 17

for mental injuries that are accompanied by physical injuries, where such issue is not presented because the passengers do not allege physical injury or physical manifestation of injury.

Appeal §§ 1087.5(2), 1129 — issue not raised below or on certiorari

5. On certiorari to review a United States Court of Appeals decision involving the question whether, under Article 17 of the Warsaw Convention, passengers can recover from an international air carrier for mental distress when an accident has not caused death, physical injury, or physical manifestation of injury, the United States Supreme Court will decline to reach the question whether the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation where (1) the Court of Appeals did not address the question, and (2) the Supreme Court did not grant certiorari to consider the question.

SYLLABUS BY REPORTER OF DECISIONS

After petitioner's plane narrowly avoided crashing during a flight between Miami and the Bahamas, respondent passengers filed separate complaints seeking damages solely for mental distress arising out of the incident. The District Court consolidated the proceedings and ruled that Article 17 of the Warsaw Convention, which sets forth conditions under which an international air carrier can be held liable for injuries to passengers, does not allow recovery for mental anguish alone. The Court of Appeals reversed, holding that the phrase "lésion corporelle" in the authentic French text of Article 17 encompasses purely emotional distress.

Held:

1. Article 17 does not allow recovery for purely mental injuries.

(a) When interpreting a treaty, this Court begins with the treaty's text and the context in which the written words are used. Other general rules of construction may be brought to bear on difficult or ambiguous passages; and, since treaties are construed more liberally than private agreements, the Court may look beyond the written words to the treaty's history, the negotiations, and the practical construction adopted by the parties.

(b) Neither the Warsaw Convention itself nor any of the applicable legal sources demonstrates that the relevant Article 17 phrase, "lésion corporelle," should be translated other than as "bodily injury"—a narrow meaning excluding purely mental injuries. Bilingual dictionaries suggest that that translation is proper, and any concerns that the dictionary definitions may be too general for purposes of treaty interpretation are partly allayed when, as here, the definitions accord with the main English translations of the Convention, including the text employed by the Senate when it ratified the Convention. Moreover, a review of relevant French legal materials reveals no legislation, judicial decisions, or scholarly writing indicating that in 1929, the year the Convention was drafted, "lésion corporelle" had a meaning in French law encompassing psychic injuries. It is unlikely that the understanding of the term "lésion corporelle" as "bodily injury" that was apparently held by the Convention's contracting parties

would have been displaced by a meaning abstracted from French damages law, which, at the relevant time, evidently allowed recovery for psychic injury, particularly when the psychic injury cause of action would not have been recognized in many other countries represented at the Convention. Nor is this conclusion altered by an examination of Article 17's structure, whereby "lésion corporelle" might plausibly be read to refer to a general class of injuries including internal injuries, in contrast with other language in the Article covering bodily ruptures. Although the official German translation of "lésion corporelle" adopted by Austria, Germany, and Switzerland used German terms whose closest English translation is apparently "infringement on the health," this Court is reluctant to place much weight on an English translation of a German translation of a French text, particularly in the absence of any German, Austrian, or Swiss cases adhering to the broad interpretation that the German delegate evidently espoused.

(c) Translating "lésion corporelle" as "bodily injury" is consistent with the negotiating history of the Convention. It is reasonable to infer that the drafters of the language that ultimately became Article 17 rejected broader proposed language, which almost certainly would have permitted recovery for emotional distress, in order to limit the types of recoverable injuries. Moreover, a review of the documentary record for the Warsaw Conference confirms that neither the drafters nor the signatories specifically considered liability for psychic injury, apparently because many, if not most, countries did not recognize recovery for such injuries at the time. Thus, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had intended to allow such recovery, as did the signatories to the Berne Convention on International Rail. The narrower reading of "lésion corporelle" also is consistent with the primary purpose of the Warsaw Convention's contracting parties, who were more concerned with limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry than they were with providing full recovery to injured passengers.

(d) On balance, the evidence of the post-1929 conduct and interpretations of the Warsaw Convention signatories supports the narrow translation of "lésion corporelle." Although a 1951 proposal to substitute "affection corporelle" for "lésion corporelle" was never implemented, the discussion and vote suggest that, in the view of the 20 signatories on the committee that adopted the proposal, "lésion corporelle" had a distinctly physical scope. Moreover, although the Hague Protocol of 1955, the Montreal Agreement of 1966, and the Guatemala City Protocol of 1971 all refer to "personal injury" rather than "bodily injury," none of these agreements support the broad interpretation reached by the Court of Appeals. There is no evidence that any of them was intended to effect a substantive change in, or clarification of, the provisions of Article 17. The Hague Protocol refers to "personal injury" only in the context of giving airline passengers notice that the Warsaw Convention in most cases imposes limits of liability for "death or personal injury." Additionally, the Montreal Agreement does

not and cannot purport to speak for the Warsaw Convention signatories, since it is not a treaty, but merely an agreement among the major international air carriers. Furthermore, the Guatemala City Protocol is not in effect in the international arena, since only a few countries have ratified it, and cannot be considered dispositive in this country, since it has not been ratified by the Senate. Also unpersuasive is the reasoning of the Supreme Court of Israel, in the only apparent judicial decision from a Warsaw Convention signatory addressing the question, that "desirable jurisprudential policy" mandates an expansive reading of Article 17 to reach purely psychic injuries. This Court cannot give effect to the Israeli court's perceived policy without convincing evidence that the signatories' intent with respect to Article 17 would allow recovery for purely psychic injury. This Court's construction better accords with the Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation, since subjecting international air carriers to *strict* liability for purely mental distress, as would the Guatemala City Protocol and the Montreal Agreement, would be controversial for most signatory countries.

2. The issue whether passengers can recover for mental injuries accompanied by physical injuries is not presented or addressed here, since respondents do not allege physical injury or physical manifestation of injury. Nor does this Court reach the question whether the Convention provides the exclusive cause of action for injuries sustained during international air transportation, since the Court of Appeals did not address it and certiorari was not granted to consider it here.

872 F2d 1462, reversed.

Marshall, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

John Michael Murray argued the cause for petitioner.
Joel D. Eaton argued the cause for respondents.
Briefs of Counsel, p 804, infra.

OPINION OF THE COURT

[499 US 532]

Justice **Marshall** delivered the opinion of the Court.

[1a] Article 17 of the Warsaw Convention[1] sets forth conditions under which an international air carrier can be held liable

[499 US 533]

for injuries to passengers. This case presents the question whether Article 17 allows recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury.

I

On May 5, 1983, an Eastern Airlines flight departed from Miami, bound for the Bahamas. Shortly after takeoff, one of the plane's three jet engines lost oil pressure. The flight crew shut down the failing engine and turned the plane around to return to Miami. Soon thereafter,

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat 3000, T S No. 876 (1934), note following 49 USC App § 1502 [USCS Conventions, "Warsaw Convention"] (hereinafter Warsaw Convention or Convention).

the second and third engines failed due to loss of oil pressure. The plane began losing altitude rapidly, and the passengers were informed that the plane would be ditched in the Atlantic Ocean. Fortunately, after a period of descending flight without power, the crew managed to restart an engine and land the plane safely at Miami International Airport. 872 F2d 1462, 1466 (CA11 1989).

Respondents, a group of passengers on the flight, brought separate complaints against petitioner, Eastern Airlines, Inc. (Eastern), each claiming damages solely for mental distress arising out of the incident. The District Court entertained each complaint in a consolidated proceeding.[2] Eastern conceded that the engine failure and subsequent preparations for ditching the plane amounted to an "accident" under Article 17 of the Convention but argued that Article 17 also makes physical injury a condition of liability. See In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport, 629 F Supp 307, 312 (SD Fla 1986). Relying on another federal court's analysis of the French authentic text

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and negotiating history of the Convention, see Burnett v Trans World Airlines, Inc., 368 F Supp 1152 (NM 1973), the District Court concluded that mental anguish alone is not compensable under Article 17. See 629 F Supp, at 314.

The Court of Appeals for the Eleventh Circuit reversed, holding that the phrase "lésion corporelle" in the authentic French text of Article 17 encompasses purely emotional distress. See 872 F2d, at 1480. To support its conclusion, the court examined the French legal meaning of the term "lésion corporelle," the concurrent and subsequent history of the Convention, and cases interpreting Article 17. See id., at 1471-1480. We granted certiorari, 496 US 904, 110 L Ed 2d 266, 110 S Ct 2585 (1990), to resolve a conflict between the Eleventh Circuit's decision in this case and the New York Court of Appeals' decision in Rosman v Trans World Airlines, Inc. 34 NY2d 385, 314 NE2d 848 (1974), which held that purely psychic trauma is not compensable under Article 17.[3] We now hold that Article 17 does not allow recovery for purely mental injuries.

II

[2] "When interpreting a treaty, we 'begin "with the text of the treaty and the context in which the written words are used."'" Volkswagenwerk Aktiengesellschaft v Schlunk, 486 US 694, 699, 100 L Ed

2. Each complaint contained two state-law tort claims, a state-law claim for breach of contract, and a claim for recovery under the Warsaw Convention. In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport, 629 F Supp 307, 309 (SD Fla 1986). The District Court dismissed all claims. Ibid. We address only the theory of recovery claimed under the Warsaw Convention.

3. Courts of first instance also have disagreed on this issue. Compare Borham v Pan American World Airways, 19 Aviation Cases 18,236 (CCH) (SDNY 1986) (purely mental injury covered); and Karfunkel v Compagnie Nationale Air France, 427 F Supp 971 (SDNY 1977) (same); and Krystal v British Overseas Airways Corp. 403 F Supp 1322 (CD Cal 1975) (same); and Husserl v Swiss Air Transport Co. 388 F Supp 1238 (SDNY 1975) (Husserl II) (same); and Palagonia v Trans World Airlines, 110 Misc 2d 478, 442 NYS2d 670 (Sup 1978) (same) with Burnett v Trans World Airlines, Inc. 368 F Supp 1152 (NM 1973) (excluding purely mental injury); and Husserl v Swiss Air Transport Co. 351 F Supp 702 (SDNY 1972) (Husserl I), aff'd, 485 F2d 1240 (CA2 1973) (same).

2d 722, 108 S Ct 2542 (1988), quoting Société Nationale Industrielle Aérospatiale v United States District Court, 482

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US 522, 534, 96 L Ed 2d 461, 107 S Ct 2542 (1987), quoting Air France v Saks, 470 US 392, 397, 84 L Ed 2d 289, 105 S Ct 1338 (1985). Accord, Chan v Korean Air Lines, Ltd. 490 US 122, 134, 104 L Ed 2d 113, 109 S Ct 1676 (1989); Maximov v United States, 373 US 49, 53-54, 10 L Ed 2d 184, 83 S Ct 1054 (1963). "Other general rules of construction may be brought to bear on difficult or ambiguous passages." Volkswagenwerk, supra, at 700, 100 L Ed 2d 722, 108 S Ct 2104. Moreover, " 'treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " Saks, supra, at 396, 84 L Ed 2d 289, 105 S Ct 1338, quoting Choctaw Nation of Indians v United States, 318 US 423, 431-432, 87 L Ed 877, 63 S Ct 672 (1943). Accord, Volkswagenwerk, supra, at 700, 100 L Ed 2d 722, 108 S Ct 2104. We proceed to apply these methods in turn.

A

[1b, 3] Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis. See Saks, supra, at 397-399, 84 L Ed 2d 289, 105 S Ct 1338. The text reads as follows:

> "Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lésion corporelle* subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement." 49 Stat 3005 (emphasis added).

The American translation of this text, employed by the Senate when it ratified the Convention in 1934, reads:

> "The carrier shall be liable for damage sustained *in the event of the death or wounding of a passenger or any other bodily injury* suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat 3018 (emphasis added).

Thus, under Article 17, an air carrier is liable for passenger injury only when three conditions are satisfied: (1) there has

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been an accident, in which (2) the passenger suffered "mort," "blessure," "ou . . . toute autre lésion corporelle," and (3) the accident took place on board the aircraft or in the course of operations of embarking or disembarking. As petitioner concedes, the incident here took place on board the aircraft and was an "accident" for purposes of Article 17. See 872 F2d, at 1471. Moreover, respondents concede that they suffered neither "mort" nor "blessure" from the mishap.[4] Therefore, the narrow issue presented here is whether, under the proper

4. Courts and commentators agree that "blessure" refers only to "a particular case of physical impact," 872 F2d 1462, 1472-1473 (CA11 1989), and thus does not by itself allow recovery for purely psychic harm. See also R. Mankiewicz, The Liability Regime of the International Air Carrier 146 (1981) (hereinafter Mankiewicz). Respondents do not contend that "blessure" has any other meaning.

interpretation of "lésion corporelle," condition (2) is satisfied when a passenger has suffered only a mental or psychic injury.

[1c] We must consider the "French legal meaning" of "lésion corporelle" for guidance as to the shared expectations of the parties to the Convention because the Convention was drafted in French by continental jurists. See Saks, supra, at 399, 84 L Ed 2d 289, 105 S Ct 1338. Perhaps the simplest method of determining the meaning of a phrase appearing in a foreign legal text would be to consult a bilingual dictionary. Such dictionaries suggest that a proper translation of "lésion corporelle" is "bodily injury." See, e.g., J. Jéraute, Vocabulaire Françaís-Anglais et Anglais-Français de Termes et Locutions Juridiques 205 (1953) (translating "bodily harm" or "bodily injury" as "lésion ou blessure corporelle"); see also id., at 95 (translating the term "lésion" as "injury, damage, prejudice, wrong"); id., at 41 (giving as one sense of "corporel" the English word "bodily"); 3 Grand Larousse de la Langue Française 1833 (1987) (defining "lésion" as a "[m]odification de la structure d'un tissu vivant sous l'influence d'une cause morbide"). These translations, if correct, clearly suggest that Article 17

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does *not* permit recovery for purely psychic injuries.[5] Although we have previously relied on such French dictionaries as a primary method for defining terms in the Warsaw Convention, see Saks, supra, at 400, and n 3, 84 L Ed 2d 289, 105 S Ct 1338, we recognize that dictionary definitions may be too general for purposes of treaty interpretation. Our concerns are partly allayed when, as here, the dictionary translation accords with the wording used in the "two main translations of the 1929 Convention in English." Mankiewicz 197. As we noted earlier, the translation used by the United States Senate when ratifying the Warsaw Convention equated "lésion corporelle" with "bodily injury." See supra, at 535, 113 L Ed 2d, at 577. The same wording appears in the translation used in the United Kingdom Carriage by Air Act of 1932. See L. Goldhirsch, The Warsaw Convention Annotated: A Legal Handbook 199, 204 (1988) (hereinafter Goldhirsch). We turn, then, to French legal materials, Saks, 470 US, at 400, 84 L Ed 2d 289, 105 S Ct 1338, to determine whether French jurists' contemporary understanding of the term "lésion corporelle" differed from its translated meaning.

In 1929, as in the present day, lawyers trained in French civil law would rely on the following principal sources of French law: (1) legislation, (2) judicial decisions, and (3) scholarly writing. See generally 1 M. Planiol & G. Ripert, Traité élémentaire de droit civil, pt 1, Nos. 10, 122, 127

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5. There is much agreement even among courts that believe that "lésion corporelle" does provide recovery for such injuries that, if "bodily injury" is the correct translation of "lésion corporelle," Article 17 does not permit recovery for purely psychic injuries. See, e.g., 872 F2d, at 1471 ("While the use of the word *corporelle* would, if read literally, appear to imply that recovery for *dommage mentale* is unavailable, we are persuaded that this literal reading is unwarranted"); Palagonia v Trans World Airlines, supra, at 482, 442 NYS2d, at 673 (arguing that "[t]he dictionary or literal translation of *lésion corporelle* as 'bodily injury' is not accurate as used in a legal document"). But see, Husserl II, supra, at 1250 (arguing that "bodily injury" "can . . . be construed to relate to emotional and mental injury").

(12th ed 1939) (Louisiana State Law Inst trans 1959); F.

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Gény, Méthode d'Interprétation et Sources en Droit Privé Positif Nos. 45-50 (2d ed 1954) (Louisiana State Law Inst trans 1963); R. David, French Law: Its Structure, Sources, and Methodology 154 (M. Kindred trans 1972). Our review of these materials indicates neither that "lésion corporelle" was a widely used legal term in French law nor that the term specifically encompassed psychic injuries.

Turning first to legislation, we find no French legislative provisions in force in 1929 that contained the phrase "lésion corporelle." The principal provision of the French Civil Code relating to the scope of compensable injuries appears to be Article 1382, which provides in very general terms: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est . . . arrivé, à le réparer." See 2 Planiol & Ripert, supra, at pt 1, No. 863 (translating Article 1382 as, "Every act whatever of man which causes damage to another obliges him by whose fault it happened to repair it").

Turning next to cases, we likewise discover no French court decisions in or before 1929 that explain the phrase "lésion corporelle," nor do the parties direct us to any. Indeed, we find no French case construing Article 17 of the Warsaw Convention to cover psychic injury. The only reports of French cases we did find that used the term "lésion corporelle" are relatively recent and involve physical injuries caused by automobile accidents and other incidents.[6] These cases tend to support the conclusion that, in French legal usage, the term "lésion corporelle" refers only to physical injuries.

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However, because they were decided well after the drafting of the Warsaw Convention, these cases do not necessarily reflect the contracting parties' understanding of the term "lésion corporelle."

Turning finally to French treatises and scholarly writing covering the period leading up to the Warsaw Convention, we find no materials (and the parties have brought none to our attention) indicating that "lésion corporelle" embraced psychic injury. Subsequent to the adoption of the Warsaw Convention, some scholars have argued that "lésion corporelle" as used in Article 17 should be interpreted to encompass such injury. See, e.g., Mankiewicz 146 (arguing that "in French law the expression *lésion corporelle* covers any 'personal' injury whatsoever"); G. Miller, Liability in International Air Transport 128 (1977) (hereinafter Miller) (arguing that "a liberal interpretation of [Article 17] would be more in line with the spirit of the Convention"). These scholars draw on the fact that, by 1929, France—unlike many other countries, see infra, at 544-545, 113 L Ed 2d, at 582-583, and n 10—permitted tort recovery for mental distress. See, e.

6. In the several such cases that we found, there was no evidence that French courts would use the term "lésion corporelle" to describe purely psychic injuries. In one case, for example, the highest French court of ordinary jurisdiction, the Cour de Cassation, specifically distinguished "coups et blessures volontaires" ("intentional blows and injuries") sustained by the plaintiff—which the court characterized as "lésions"—from "[les] troubles de nature névrotique" ("neurotic disorders") from which the plaintiff suffered as a result of a prior incident. See Judgment of November 4, 1971, Cour de Cassation, 1971 Bull Civ II 219, 220.

g., 2 Planiol & Ripert, supra, at pt 1, No. 868A (citing cases awarding damages for injury to honor and for loss of affection). However, this *general* proposition of French tort law does not demonstrate that the *specific* phrase chosen by the contracting parties—"lésion corporelle"—covers purely psychic injury.

We find it noteworthy, moreover, that scholars who read "lésion corporelle" as encompassing psychic injury do not base their argument on explanations of this term in French cases or French treatises or even in the French Civil Code; rather, they chiefly rely on the principle of French tort law that any damage can "giv[e] rise to reparation when it is real and has been verified." 2 Planiol & Ripert, supra, at pt 1, No. 868. We do not dispute this principle of French law. However, we have been directed to no French case prior to 1929 that allowed recovery based on that principle for the

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type of mental injury claimed here—injury caused by fright or shock—absent an incident in which *someone* sustained physical injury.[7] Since our task is to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties," Saks, supra, at 399, 84 L Ed 2d 289, 105 S Ct 1338, we find it unlikely that those parties' apparent understanding of the term "lésion corporelle" as "bodily injury" would have been displaced by a meaning abstracted from the French law of damages. Particularly is this so when the cause of action for psychic injury that evidently was possible under French law in 1929 would not have been recognized in many other countries represented at the Warsaw Convention. See infra, at 544-545, 113 L Ed 2d, at 582-583, and n 10.

Nor is this conclusion altered by our examination of Article 17's structure. In the decision below, the Court of Appeals found that the Article's wording "suggests that the drafters did not intend to exclude any particular category of damages," because if they had intended "to refer only to injury caused by physical impact," they "would not have singled out

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and specifically referred to a particular case of physical impact such as *blessure* ('wounding')." 872 F2d, at 1472-1473 (citing Mankiewicz 146). This argument, which has much the same force as the surplusage canon of domestic statutory construction, is plausible. Cf. Reiter v Sonotone Corp. 442 US 330, 339, 60 L Ed 2d 931, 99 S Ct 2326 (1979). Yet one might draw a con-

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7. Of the two cases cited by Mankiewicz to demonstrate that French law did compensate mental injuries, one involved recovery by a stepdaughter for emotional distress resulting from the death of her stepmother and the other involved recovery for injury to honor arising from adultery. See Mankiewicz 145 (citing decisions of the highest French court in 1923 and 1857). See also 11 International Encyclopedia of Comparative Law: Torts ch 9, § 9-39, pp 16-17, and nn 114-115 (A. Tunc ed 1972) (citing, as the first personal injury cases permitting recovery for nonpecuniary damages, an 1833 French decision in which "counsel for the plaintiff took as an illustration of *dommage moral* for which recovery should be permitted the grief of a family upon the death of one of their members" and an 1881 Belgian decision in a wrongful death case). Whether the "shared expectation" of the Warsaw Convention parties was that the distress experienced by relatives of injured or dead airline passengers qualified under Article 17 as "*dommage survenu* en cas de mort, [ou] de blessure . . . subie par un voyageur" ("*damage sustained* in the event of the death or wounding of a passenger") is a different question from whether psychic injury actually suffered by a passenger is encompassed by the term "lésion corporelle."

trary inference from the same language. As noted, one meaning of "lésion" is a change in the structure of an organ due to injury or disease. See supra, at 536, 113 L Ed 2d, at 578, citing 3 Grand Larousse de la Langue Française 1833 (1987). If "blessure" refers to injuries causing visible ruptures in the body (a common meaning of a "wounding"), "lésion corporelle" might well refer to a more general category of physical injuries that includes internal injuries caused, for example, by physical impact, smoke or exhaust inhalation, or oxygen deprivation. Admittedly, this inference still runs afoul of the Court of Appeals' surplusage argument. However, because none of the other sources of French legal meaning noted above support the Court of Appeals' construction, we are reluctant to give this argument dispositive weight.

The same structural argument offered by the Court of Appeals was advanced by one of the German delegates to the Warsaw Convention. See Palagonia v Trans World Airlines, 110 Misc 2d 478, 483, 442 NYS2d 670, 673-674 (Sup 1978) (quoting testimony of Otto Riese). Accordingly, the official German translation of "lésion corporelle" adopted by Austria, Germany, and Switzerland uses German terms whose closest English translation is apparently "infringement on the health." See Mankiewicz 146. We are reluctant, however, to place much weight on an English translation of a German translation of a French text, particularly when we have been unable to find (and the parties have not cited) any German, Austrian, or Swiss cases adhering to the broad interpretation of Article 17 that the German delegate evidently espoused.

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In sum, neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that "lésion corporelle" should be translated other than as "bodily injury"—a narrow meaning excluding purely mental injuries. However, because a broader interpretation of "lésion corporelle" reaching purely mental injuries is plausible, and the term is both ambiguous and difficult, see supra, at 535, 113 L Ed 2d, at 577, we turn to additional aids to construction.[8]

B

[1d] Translating "lésion corporelle" as "bodily injury" is consistent, we think, with the negotiating history of the Convention. "The treaty that became the Warsaw Convention was first drafted at an international conference in Paris in 1925." Air France v Saks, 470 US, at 401, 84 L Ed 2d 289, 105 S Ct 1338; see also Chan v Korean Air Lines, Ltd. 490 US, at 139, 104 L Ed 2d 113, 109 S Ct 1676 (Brennan, J., concurring in judgment). See generally [1925 Paris] Conférence Internationale de Droit Privé Aérien (1936) (hereinafter Paris Conference). The final protocol of the Paris Conference contained an article specifying that: " 'The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage . . . .' " Saks, supra, at 401, 84 L Ed 2d 289, 105 S Ct 1338, translating Article 5 of the protocol, Paris Con-

8. We will refer to these alternative interpretations of "lésion corporelle" as the "nar row" and "broad" readings of the term.

ference 87. It appears that "[t]his expansive provision, broadly holding carriers liable in the event of an accident, would almost certainly have permitted recovery for all types of injuries, including emotional distress." Sisk, Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of *Lésion Corporelle,* 25 Texas Int'l LJ 127, 142 (1990), citing Miller 124.

The Paris Conference appointed a committee of experts, the Comité International Technique d'Experts Juridiques Aériens (CITEJA), to revise its final protocol for presentation

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to the Warsaw Conference. See Chan, supra, at 139, 104 L Ed 2d 113, 109 S Ct 1676 (Brennan, J., concurring in judgment); Saks, supra, at 401, 84 L Ed 2d 289, 105 S Ct 1338. The CITEJA draft split the liability article of the Paris Conference's protocol into three provisions with one addressing damages for injury to passengers, the second addressing injury to goods, and the third addressing losses caused by delay. The CITEJA subsection on injury to passengers introduced the phrase "en cas de mort, de blessure ou de toute autre lésion corporelle." [Deuxième] Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 171-172 (1929) (Article 21, subsection (a) of the CITEJA draft). This language was retained in Article 17 ultimately adopted by the Warsaw Conference. See 49 Stat 3005. Although there is no definitive evidence explaining why the CITEJA drafters chose this narrower language, we believe it is reasonable to infer that the Conference adopted the narrower language to limit the types of recoverable injuries. Cf. Volkswagenwerk Aktiengesellschaft v Schlunk, 486 US, at 700-701, 100 L Ed 2d 722, 108 S Ct 2104 (noting significance of change in negotiating history of Hague Service Convention from less precise term in draft to more precise term in final treaty provision).[9]

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Our review of the documentary record for the Warsaw Conference confirms—and courts and commentators appear universally to agree—that there is no evidence that the

9. Courts and commentators, including the Court of Appeals, have cited the doctoral thesis of a French scholar, Yvonne Blanc-Dannery, as extrinsic evidence of the Warsaw parties' intent. See, e.g., 872 F2d, at 1472; Palagonia, 110 Misc 2d, at 482, 442 NYS2d, at 673; Mankiewicz 146. According to Mankiewicz, the Blanc-Dannery thesis was written under the supervision of Georges Ripert. Mankiewicz 146, citing Blanc-Dannery, La Convention de Varsovie et les Régles du Transport Aérien International (1933) (hereinafter Blanc-Dannery). Georges Ripert was a leading French delegate at the Warsaw Convention and an expert of the French Government at the CITEJA proceedings. Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw 6 (R. Horner & D. Legrez trans 1975) (hereinafter Minutes). Mankiewicz translates a passage from the Blanc-Dannery thesis as follows: " 'The use of the expression *lésion* after the words 'death' and 'wounding' encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest in the organism but which can be related to the accident.' " Mankiewicz 146. Eastern offers persuasive evidence that Mankiewicz's translation may be overbroad. See Reply Brief for Petitioner 2 (noting that the French word "perturbations" should be translated to connote a disturbance or aberration in a bodily organ or function rather than mere traumatisms or nervous troubles). Even if Mankiewicz's translation is accurate, however, Blanc-Dannery's asserted definition is not supported by evidence from the CITEJA or Warsaw proceedings. See Blanc-Dannery 62. In the absence of such support we find the Blanc-Dannery thesis to have little or no value as evidence of the drafters' intent.

drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of "lésion corporelle." See generally Minutes. Two explanations commonly are offered for why the subject of mental injuries never arose during the Convention proceedings: (1) many jurisdictions did not recognize recovery for mental injury at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury. See, e.g., Husserl v Swiss Air Transport Co. 388 F Supp 1238, 1249 (SDNY 1975) (Husserl II); Cie Air France v Teichner, 39 Revue Française de Droit Aérien 232, 242, 23 Eur Tr L 87, 101 (Israel 1984); Mankiewicz 144-145; Miller 123-125. Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference[10] persuades us that the signatories

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had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.

In this sense, we find it significant that, when the parties to a different international transport treaty wanted to make it clear that rail passengers could recover for purely psychic harms, the drafters made a specific modification to this effect. The liability provision of the Berne Convention on International Rail, drafted in 1952, originally conditioned liability on "la mort, les blessures et toute autre atteinte, à l'intégrité corporelle." International Convention Concerning the Carriage of Passengers and Luggage By Rail, Berne, Oct. 25, 1952, 242 UNTS 355, Article 28, p 390. The drafters subsequently modified this provision to read "l'intégrité physique *ou mentale.*" See Additional Convention to the International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV) of Feb. 25, 1961, Relating to the Liability of the Railway for Death of and Per-

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10. Although French law recognized recovery for certain types of mental distress long before the Convention was drafted, see Mankiewicz 145, in common-law jurisdictions mental distress generally was excluded from recovery in 1929. See Miller 113. Such recovery was not definitively recognized in the United Kingdom until the early 1940's. See Mankiewicz 145; J. Fleming, Law of Torts 49 (1985) (hereinafter Fleming). American courts insisted on a physical impact rule long after English courts abandoned the practice. See ibid.; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 54, p 363 (5th ed 1984). In the State of New York, where many Warsaw Convention cases have been litigated, recovery for purely mental injury was not recognized until 1961. See Mankiewicz 145, citing Battalla v State, 10 NY2d 237, 176 NE2d 729 (1961); see also Miller 113-115 (noting the post-1929 liberalization of rules for tort recovery in the United Kingdom and the United States). Several of the civil law and socialist signatories to the Warsaw Convention were slow to recognize recovery for non-pecuniary losses such as pain and suffering, grief caused by the death of a relative, or mental distress. See 11 International Encyclopedia of Comparative Law: Torts, Ch 9, §§ 9-39, 9-40. The Netherlands, for example, did not permit nonpecuniary damages until 1943, and the German and Swiss Civil Codes generally barred nonpecuniary damages, though with certain exceptions —including an exception for cases of personal injury. See id., at § 9-41. In addition, the Soviet Union, another original signatory, has never recognized compensation for nonpecuniary loss. Id., at § 9-37. In countries barring recovery for non-pecuniary losses, recovery for mental injuries might have been available where financial loss could be shown, however, we are not aware of any such cases.

sonal Injury to Passengers, done Feb. 26, 1966, Art 2, reprinted in Transport: International Transport Treaties V-52

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(Kluwer Publishers) (Supp 1-10, Jan. 1986) (emphasis added).

The narrower reading of "lésion corporelle" also is consistent with the primary purpose of the contracting parties to the Convention: limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry. See Trans World Airlines, Inc. v Franklin Mint Corp. 466 US 243, 256, 80 L Ed 2d 273, 104 S Ct 1776 (1984); Minutes 37; Lowenfeld & Mendelsohn, The United States and The Warsaw Convention, 80 Harv L Rev 497, 498-499 (1967) (hereinafter Lowenfeld & Mendelsohn). Indeed, it was for this reason that the Warsaw delegates imposed a maximum recovery of $8,300 for an accident—a low amount even by 1929 standards. See Lowenfeld & Mendelsohn 498-499.[11] Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read "lésion corporelle" in a way that respects that legislative choice.

C

[1e] We also conclude that, on balance, the evidence of the post-1929 "conduct" and "interpretations of the signatories," Saks, 470 US, at 403, 84 L Ed 2d 289, 105 S Ct 1338, supports the narrow translation of "lésion corporelle."

In the years following adoption of the Convention, some scholars questioned whether Article 17 extended to mental or emotional injury. See, e. g., Beaumont, Need for Revision and Amplification of the Warsaw Convention, 16 J Air L & Com 395, 402 (1949); R. Coquoz, Le Droit Privé International Aérien 122 (1938); Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J Air L 1, 19 (1936). In 1951, a committee composed of 20 Warsaw

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Convention signatories met in Madrid and adopted a proposal to substitute "affection corporelle" for "lésion corporelle" in Article 17. See International Civil Aviation Organization Legal Committee, Minutes and Documents of the Eighth Session, Madrid, ICAO Doc 7229-LC/133, pp xiii, 137 (1951). The French delegate to the committee proposed this substitution because, in his view, the word "lésion" was too narrow, in that it "presupposed a rupture in the tissue, or a dissolution of continuity" which might not cover an injury such as mental illness or lung congestion caused by a breakdown in the heating apparatus of the aircraft. See id., at 136. The United States delegate opposed this change if it "implied the inclusion of mental injury or emotional disturbances or upsets which were not connected with or the result of bodily injury," see id., at 137, but the committee adopted it nonetheless, see ibid. Although the committee's proposed amendment was never subsequently implemented, its discus-

11. The second goal of the Convention was to establish uniform rules governing documentation such as airline tickets and waybills and uniform procedure for addressing claims arising out of international transportation. See Minutes 85, 87; Lowenfeld & Mendelsohn 499. Our construction of "lésion corporelle" also is consistent with that goal. See infra, at 552, 113 L Ed 2d, at 587-588.

sion and vote in Madrid suggest that, in the view of the 20 signatories on the committee, "lésion corporelle" in Article 17 had a distinctly physical scope.

In finding that the signatories' post-1929 conduct supports the broader interpretation of "lésion corporelle," the Court of Appeals relied on three international agreements: The Hague Protocol of 1955, The Montreal Agreement of 1966, and the Guatemala City Protocol of 1971. See 872 F2d, at 1474-1475. For each of these agreements, the Court of Appeals emphasized that English translations rendered "lésion corporelle" as "personal injury," instead of "bodily injury." In our view, none of these agreements support the broad interpretation of "lésion corporelle" reached by the Court of Appeals.

The Hague Protocol amended Article 3 of the Warsaw Convention,[12] which sets forth the particular information a passenger's

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ticket must contain, to require notice of the limitation upon the carrier's liability for passenger injuries under the Convention. See Hague Protocol Article III, reprinted in Goldhirsch 266. While the authentic French version of Article 3 retained the phrase "lésion corporelle," the authentic *English* version of the Hague Protocol, which was proposed by the United States delegation, used the phrase "personal injury." See 2 International Civil Aviation Organization, International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc 7686-LC/140, p 243 (proposal of the United States); see also Goldhirsch 266 (citing final version of Hague Protocol).[13] Citing Saks, the Court of Appeals treated the Hague Protocol's use of "personal injury" as a " 'subsequent interpretation[ ]' " of the signatories" that "helps clarify the meaning" of "lésion corporelle." See 872 F2d, at 1474-1475. However, we do not accept the argument that the Hague Protocol signatories intended "personal injury" to be an interpretive translation of "lésion corporelle" where there is no evidence that they intended the authentic English text to effect a substantive change in, or

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clarification of that term. Moreover, the portion of Article 3 of the Hague Protocol in which "personal injury" appears is concerned solely with informing passengers that when the convention "governs" it "in most cases limits the liability of carriers

12. The Hague Protocol also amended the Convention to double the limit of liability for accidents to $16,600. See Hague Protocol Article XI, reprinted in Goldhirsch 268-269; Lowenfeld & Mendelsohn 507-509.

At the Hague Conference, the signatories were presented with a proposal to amend Article 17 to cover purely mental injuries. The Greek delegation proposed adding the word "mental" to Article 17 because it was "not clear" whether Article 17 allowed recovery for such injury. See 1 International Civil Aviation Organization, International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc 7686-LC/140, p 261. No one seconded this proposal. Ibid. In the absence of further discussion by the delegates, we cannot infer much from that fact.

13. According to the English text of the final version, passenger tickets must contain "a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers *for death or personal injury* and in respect of loss of or damage to baggage." Goldhirsch 266 (emphasis added).
The French version of the text emphasized above reads: "en cas de mort ou de lésion corporelle." Id., at 256.

for death or personal injury." See supra, n 13. It may be, therefore, that the signatories used "personal injury" not as an interpretive translation of "lésion corporelle" but merely as a way of giving a summary description of the limitations of liability imposed by the Convention.

The Montreal Agreement of 1966 is similarly inconclusive. The Agreement, which affects only international flights with connecting points in the United States, raised the limit of liability to $75,000 and waived due-care defenses. See Montreal Agreement, reprinted in Goldhirsch 317-318; Lowenfeld & Mendelsohn 596-597. The Court of Appeals noted that, under the Montreal Agreement, the notice appearing on passenger tickets used the term "personal injury" rather than "bodily injury" and that the United States Civil Aeronautics Board used these terms interchangeably in approving the Agreement. 872 F2d, at 1474. For two reasons, we do not believe that this evidence bears on the signatories' understanding of "lésion corporelle" in Article 17. First, as the Court of Appeals acknowledged, "[t]he Montreal Agreement is not a treaty, but rather an agreement among all major international air carriers that imposes a quasi-legal and largely experimental system of liability essentially contractual in nature." Id., at 1468-1469. Therefore, the Montreal Agreement does not and cannot purport to speak for the signatories to the Warsaw Convention. Second, the Montreal Agreement does not purport to change or clarify the provisions of Article 17.

We likewise do not believe that the Guatemala City Protocol of 1971 sheds any light upon the intended scope of Article 17. The Protocol was drafted in three authentic texts, English, French, and Spanish, but the French text was to control

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in cases of conflict. See Guatemala City Protocol Article XXVI, reprinted in Goldhirsch 329. The Protocol amended the French text of Article 17 by deleting the word "blessure," while retaining "lésion corporelle." See 2 International Civil Aviation Organization, International Conference on Air Law, Guatemala City, ICAO Doc 9040-LC/167-2, p 183 (1972). Additionally, the English text of the Protocol substituted "personal injury" for "wounding or other bodily injury" in Article 17. See Guatemala City Protocol Article IV, reprinted in Goldhirsch 320-321. The Court of Appeals read the changes in both the French and English versions of Article 17 as supporting an interpretation of "lésion corporelle" broader than "bodily injury." See 872 F2d, at 1475.

For several reasons, however, we disagree. First, there is no evidence that the changes to the English or French text were intended to effect a substantive change or clarification. Cf. Miller 123 (noting that the change to the English text was inconspicuously proposed by a drafting group of the ICAO Legal Committee as a minor drafting improvement). Neither mental injuries nor the minor drafting changes were discussed at the Guatemala City Conference. See 1 International Civil Aviation Organization, International Conference on Air Law, Minutes, Guatemala City, ICAO Doc 9040-LC/167-1, pp 31-38, 41-63 (1972). Second, of the approximately 120 signatories to the Warsaw Convention, only a few countries have actually ratified the Guatemala City Protocol, see Mank-

iewicz 237, and therefore the Protocol is not in effect in the international arena. Likewise, we have stated that because the United States Senate has not ratified the Protocol we should not consider it to be dispositive. See Saks, supra, at 403, 84 L Ed 2d 289, 105 S Ct 1338.

We must also consult the opinions of our sister signatories in searching for the meaning of a "lésion corporelle." See Saks, 470 US, at 404, 84 L Ed 2d 289, 105 S Ct 1338. The only apparent judicial decision from a sister signatory addressing recovery for purely mental injuries under Article 17 is that of the Supreme Court of

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Israel. That court held that Article 17 does allow recovery for purely psychic injuries. See Cie Air France v Teichner, 39 Revue Francaise de Droit Aérien, at 243, 23 Dur Tr L, at 102.[14]

Teichner arose from the hijacking in 1976 of an Air France flight to Entebbe, Uganda. Passengers sought compensation for psychic injuries caused by the ordeal of the hijacking and detention at the Entebbe Airport. While acknowledging that the negotiating history of the Warsaw Convention was silent as to the availability of such compensation, id., at 242, 23 Eur Tr L, at 101, the court determined that "desirable jurisprudential policy" ("la politique jurisprudentielle souhaitable") favored an expansive reading of Article 17 to reach purely psychic injuries. Id., at 243, 23 Eur Tr L, at 102. In reaching this conclusion, the court emphasized the post-1929 development of the aviation industry and the evolution of Anglo-American and Israeli law to allow recovery for psychic injury in certain circumstances. Ibid., 23 Eur Tr L, at 101-102. In addition, the court followed the view of Miller that this expansive construction was desirable to avoid an apparent conflict between the French and English versions of the Guatemala City Protocol. Id., at 243-244, 23 Eur Tr L, at 102, citing Miller 128-129.

Although we recognize the deference owed to the Israeli court's interpretation of Article 17, see Saks, supra, at 404, 84 L Ed 2d 289, 105 S Ct 1338, we are not persuaded by that court's reasoning. Even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy goal, we cannot give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery. As discussed, neither the language, negotiating history, nor postenactment interpretations of Article 17 clearly evidences such intent. Nor does the Guatemala City Protocol support the Israeli court's conclusion because nothing in the Protocol

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purports to amend Article 17 to reach mental injuries. Moreover, although the Protocol reflects a liberalization of attitudes toward passenger recovery in that it provides for strict liability, see Article IV, reprinted in Goldhirsch 320, the fact that the Guatemala City Protocol is still not in effect after almost 20 years since it was drafted should caution *against* attaching significance to it.

Moreover, we believe our construction of Article 17 better accords with the Warsaw Convention's stated purpose of achieving uniformity of rules

14. In the only published versions that we could find, the Israeli opinion is reported in French.

governing claims arising from international air transportation. See n 11, supra. As noted, the Montreal Agreement subjects international carriers to strict liability for Article 17 injuries sustained on flights connected with the United States. See supra, at 549, 113 L Ed 2d, at 586. Recovery for mental distress traditionally has been subject to a high degree of proof, both in this country and others. See Prosser and Keeton on Torts, at 60-65, 359-361 (American courts require extreme and outrageous conduct by the tortfeasor); Fleming 49-50 (British courts limit such recovery through the theory of foreseeability); Miller 114, 126 (French courts require proof of fault and proof that damage is direct and certain). We have no doubt that subjecting international air carriers to *strict* liability for purely mental distress would be controversial for most signatory countries. Our construction avoids this potential source of divergence.

III

[1f, 4] We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. Although Article 17 renders air carriers liable for "damage sustained in the event of" ("dommage survenu en cas de") such injuries, see 49 Stat 3005, 3018, we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries. That issue is

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not presented here because respondents do not allege physical injury or physical manifestation of injury. See App 3-9.

[5] Eastern urges us to hold that the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation. The Court of Appeals did not address this question, and we did not grant certiorari to consider it. We therefore decline to reach it here.

The judgment of the Court of Appeals is reversed.

It is so ordered.

EDITOR'S NOTE

An annotation on "Supreme Court's construction and application of Warsaw Convention (49 Stat 3000 et seq.), pertaining to international air transportation," appears p 806, infra.

[499 US 554]

COTTAGE SAVINGS ASSOCIATION, Petitioner

v

COMMISSIONER OF INTERNAL REVENUE

499 US 554, 113 L Ed 2d 589, 111 S Ct 1503

[No. 89-1965]

Argued January 15, 1991. Decided April 17, 1991.

Decision: Financial institution's losses from exchanging its interests in residential mortgage loans for other lenders' interests in residential mortgage loans held tax-deductible in year of exchange.

SUMMARY

In 1980, a savings and loan association which at that time was regulated by the Federal Home Loan Bank Board (FHLBB) (later abolished) sold 90-percent participation interests in 252 mortgage loans to four other lenders and simultaneously purchased 90-percent participation interests in 305 mortgage loans held by these lenders, where by exchanging merely participation interests rather than the loans themselves, each party retained its relationship with the individual obligors. All of the loans involved in the transaction were secured by single-family homes, most of which were located in the same geographic area. The fair market value of the interests relinquished by each side was approximately $4.5 million, while the face value of the interests relinquished by the association was approximately $6.9 million. For FHLBB accounting purposes, the transaction was treated as an exchange of substantially identical mortgages, which meant that the association's loss on the exchange did not have to be reported to the FHLBB. On its 1980 federal income tax return, the association claimed a deduction for the adjusted difference between the face value of the participation interests that the association had traded and the fair market value of the participation interests that it had received. After the Commissioner of Internal Revenue disallowed the claimed deduction, the Tax Court held that the deduction was permissible (90 TC 372). The United States Court of Appeals for the Sixth Circuit reversed the Tax Court judgment and held that although the association had realized losses through the exchange, the association was not entitled to deduct the losses because, for purposes of 26

Briefs of Counsel, p 820, infra.

USCS § 165(a), which allows an income tax deduction for any uncompensated loss sustained during the tax year, the losses were not actually sustained during the 1980 tax year (890 F2d 848).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by MARSHALL, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., it was held that the association realized deductible losses for the 1980 tax year, because (1) under § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a)), which defines the gain or loss from the sale or other disposition of property as the difference between the amount realized from the disposition and the property's adjusted basis, the association realized its losses at the point of the exchange, since the exchanged properties were materially different, given that (a) being derived from loans made to different obligors and secured by different homes, the properties embodied legally distinct entitlements, (b) both the association and the Commissioner of Internal Revenue were in a position to determine the change in the value of the association's mortgage loans relative to their tax bases, and (c) mortgage loans can be substantially identical for FHLBB accounting purposes and still exhibit material differences for purposes of the Internal Revenue Code; and (2) the losses were sustained within the meaning of § 165(a) of the Code (26 USCS § 165(a)), which is interpreted under Treasury Regulation § 1.165-1(b) (26 CFR § 1.165-1(b)) to allow the deduction of a loss sustained during the tax year only if the loss is bona fide, since there was no contention that the exchange was not conducted at arm's length or that the association retained de facto ownership of the participation interests it relinquished.

BLACKMUN, J., joined by WHITE, J., dissented, expressing the view that the association did not realize income-tax-deductible losses from the transaction, because the mortgage participation partial interests released by the association in the transaction were not materially different from those received, since (1) the transaction was an exchange of substantially identical mortgages for FHLBB accounting purposes, and (2) the parties' handling of the transaction and of the mortgage loans after completion of the transaction revealed that any differences that might exist were not material.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Income Taxes § 137 — disposition of property — deductibility of losses — residential mortgages — partial participation interests

1a-1d. A savings and loan association realizes deductible losses for the federal income tax year in which, at the time the association is regulated by the Federal Home Loan Bank Board (FHLBB) (later abolished), it exchanges 90-percent participation interests in a group of residential mortgage loans for 90-percent participation interests in a group of residential mortgage loans held by other lenders—where (1) all of the loans involved in the transaction are secured by single-family homes, most of which are located in the same geographic area, (2) the fair market value of the interests received by the association is approximately equal to the fair market value, but less than the face value, of the interests relinquished by the association, and (3)

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

34 Am Jur 2d, Federal Taxation §§ 4000-4003, 4050, 4051, 6576, 6578

20 Am Jur Trials 255, Preparing a Federal Income Tax Case for Trial

26 USCS §§ 165(a), 1001(a)

RIA Federal Tax Coordinator 2d ¶¶ I-1950, I-1952, I-2001, I-2201, I-2202

L Ed Digest, Income Taxes §§ 126, 137

L Ed Index, Exchange of Property; Income Taxes

Index to Annotations, Exchange of Property; Income Tax; Sale and Transfer of Property

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. 39 L Ed 2d 942.

Modern status of rule dealing with public policy as ground for denying deduction for federal income tax purposes. 16 L Ed 2d 1117; 27 ALR2d 498.

Federal income tax: Year in which guarantor may take loss or bad debt deduction. 23 ALR2d 431.

for FHLBB accounting purposes, the transaction is treated as an exchange of substantially identical mortgages, which means that the association's loss on the exchange does not have to be reported to the FHLBB—because (1) under § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a)), which defines the gain or loss from the sale or other disposition of property as the difference between the amount realized from the disposition and the property's adjusted basis, the association realizes its losses, represented by the adjusted difference between the face value of the interests relinquished and the fair market value of the interests received, at the point of the exchange, since the exchanged properties are materially different, given that (a) the participation interests exchanged derive from loans that were made to different obligors and secured by different homes, and thus the exchanged interests embody legally distinct entitlements, (b) the association's receipt of entitlements different from those it gave up puts both the association and the Commissioner of Internal Revenue in a position to determine the change in the value of the association's mortgage loans relative to their tax bases, and (c) mortgage loans can be substantially identical for FHLBB accounting purposes and still exhibit material differences for purposes of the Internal Revenue Code; and (2) the association sustains its losses within the meaning of § 165(a) of the Code (26 USCS § 165(a))—which allows an income tax deduction for any uncompensated loss sustained during the taxable year and is interpreted by the Commissioner, under Treasury Regulation § 1.165-1(b) (26 CFR § 1.165-1(b)), to allow only a bona fide loss that is one of substance and not mere form—since there is no contention that the exchange was not conducted at arm's length or that the association retains de facto ownership of the participation interests it relinquished. (Blackmun and White, JJ., dissented from this holding.)

Income Taxes §§ 126, 137 — sale or disposition of property — realization of gain or loss — when taxable or deductible

2. Rather than assessing federal income tax liability on the basis of annual fluctuations in the value of a taxpayer's property, the Internal Revenue Code defers the tax consequences of a gain or loss in property value until the taxpayer realizes the gain or loss; the realization requirement is implicit in § 1001(a) of the Code (26 USCS § 1001(a)), which defines the gain or loss from the sale or disposition of property as the difference between the amount realized from the disposition and the adjusted basis of the property; the concept of realization is founded on administrative convenience, because (1) under an appreciation-based system of taxation, taxpayers and the Commissioner of Internal Revenue would have to undertake the cumbersome, abrasive, and unpredictable administrative task of valuing assets on an annual basis to determine whether the assets had appreciated or depreciated in value, while (2) in contrast, a change in the form or extent of an investment is easily detected by a taxpayer or an administrative officer.

Income Taxes §§ 126, 137; Internal Revenue §§ 2.2, 82.5 — disposition of property — gain or loss — when taxable or deductible — re-enactment of statute — regulatory interpretations — judicial deference

3a, 3b. Under § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a)), which defines the gain or loss from the sale or other disposition of property as the difference between the amount realized from the disposition and the adjusted basis of the property, an exchange of property gives rise to a realization event for which the tax consequences may be recognized in the tax year of the event, so long as the exchanged properties are materially different, because (1) the Commissioner of Internal Revenue, under Treasury Regulation § 1.1001-1 (26 CFR § 1.1001-1), has construed § 1001(a) to embody a material-difference requirement; (2) in view of the fact that Congress, under 26 USCS § 7805(a), has delegated to the Commissioner the power to promulgate all needful rules and regulations for the enforcement of the Code, the United States Supreme Court must defer to the Commissioner's regulatory interpretations of the Code so long as they are reasonable; and (3) the regulation is a reasonable interpretation of § 1001(a), given that (a) the language that comprises § 1001(a), which language was first employed by Congress in 1924, has remained essentially unchanged through various re-enactments, (b) since 1934, the Commissioner has construed the statutory term "disposition of property" to include a material-difference requirement, and (c) Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law, and (d) where the United States Supreme Court's landmark decisions indicating that a taxpayer realizes taxable income on an exchange of property only if the properties exchanged are materially or essentially different were part of the contemporary legal context in which Congress enacted § 1001(a)'s predecessor in 1924, and where Congress, through subsequent re-enactments, has left undisturbed the principles of realization established in these cases, it may be presumed that Congress intended to codify these principles in § 1001(a).

Income Taxes § 158; Internal Revenue § 2.2 — court's deference to Commissioner — re-enactment of statute

4a, 4b. Unlike the question whether § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a)), which defines the gain or loss from the sale or other disposition of property as the difference between the amount realized from the disposition and the adjusted basis of the property, requires that there be a material difference between the properties exchanged in order for a gain or loss on the exchange to be realized for income tax purposes, the question of what constitutes a material difference for purposes of § 1001(a) is not one on which the United States Supreme Court can defer to the Commissioner of Internal Revenue, because the Commissioner has not issued an authoritative, prelitigation interpretation of what property exchanges satisfy this requirement, where the Commissioner has not argued that the position taken in two

Revenue Rulings—which postdate the reciprocal mortgage exchange transaction at issue in the case at hand—that mortgages exchanged through reciprocal mortgage sales are not materially different is entitled to deference; thus, to give meaning to the material-difference test, the Supreme Court must look to the case law from which the test derives, where the court believes that Congress intended to codify this case law in enacting and re-enacting the language that comprises § 1001(a).

Income Taxes §§ 126, 137 — disposition of property — realization of gain or loss — material difference

5a-5c. For purposes of the requirement under § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a))—which defines the gain or loss from the sale or other disposition of property as the difference between the amount realized from the disposition and the adjusted basis of the property—that to constitute a realizable event, from which the gain or loss is taxable or deductible in the year of the event, the properties exchanged in a transaction must be materially different, such properties are materially different so long as the possessors of the properties enjoy legal entitlements that are different in kind or extent, because (1) so long as the entitlements are not identical, their exchange will allow both the Commissioner of Internal Revenue and the transacting taxpayer easily to fix the appreciated or depreciated values of the properties relative to their tax bases; and (2) with respect to the "economic substitute" concept of material difference—under which the differences between properties are material for purposes of § 1001(a) only when it can be said that the parties to the exchange, the relevant market regarding the properties exchanged, and the relevant regulatory body regarding the properties exchanged would consider the differences between the properties to be material—(a) nothing in the United States Supreme Court's earlier landmark decisions indicating that a taxpayer realizes taxable income only if the properties exchanged are materially or essentially different suggests that exchanges of properties must satisfy such a subjective test to trigger realization of a gain or loss, (b) the complexity of such an approach ill serves the goal of administrative convenience that underlies the realization requirement of § 1001(a), and (c) if Congress had expected that exchanges of similar properties would not count as realization events under § 1001(a), it would have had no reason to bar recognition of a gain or loss realized from certain types of these transactions under such nonrecognition provisions in the Code as 26 USCS § 1031(a)(1), which withholds recognition of a gain or loss realized when property held for productive use in a trade or business or for investment is exchanged for property of like kind which is to be held either for productive use in a trade or business or for investment. (Blackmun and White, JJ., dissented from this holding.)

Income Taxes §§ 126, 137 — disposition of property — realization of gain or loss — exchange of corporate stock — material difference

6. For purposes of the requirement under § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a))—which defines the gain or loss from

the sale or other disposition of property as the difference between the disposition amount realized and the adjusted basis of the property—that to constitute a realizable event, from which the gain or loss is taxable or tax deductible in the year of the event, the properties exchanged in a transaction must be materially different, separate groups of stock are not materially different if they confer the same proportional interest of the same character in the same corporation, because the respective possessors of the stock do not enjoy legal entitlements that are different in kind or extent; however, the groups of stock are materially different if they are issued by different corporations or if they confer different rights and powers in the same corporation.

SYLLABUS BY REPORTER OF DECISIONS

Petitioner Cottage Savings Association simultaneously sold participation interests in 252 mortgages to four savings and loan associations and purchased from them participation interests in 305 other mortgages. All of the loans were secured by single-family homes. The fair market value of the package of participation interests exchanged by each side was approximately $4.5 million. The face value of the participation interests relinquished by Cottage Savings was $6.9 million. For Federal Home Loan Bank Board (FHLBB) accounting purposes, Cottage Savings' mortgages were treated as having been exchanged for "substantially identical" ones held by the other lenders. On its 1980 federal income tax return, Cottage Savings claimed a deduction for the adjusted difference between the face value of the interests it traded and the fair market value of the interests it received. Following the Commissioner's disallowance of the deduction, the Tax Court determined the deduction was permissible. The Court of Appeals reversed, finding that Cottage Savings had realized its losses through the transaction, but that it was not entitled to a deduction because its losses were not actually sustained for purposes of § 165(a) of the Internal Revenue Code, which allows deductions only for bona fide losses.

Held:

1. Cottage Savings realized a tax-deductible loss because the properties it exchanged were materially different.

(a) In order to avoid the cumbersome, abrasive, and unpredictable administrative task of valuing assets annually to determine whether their value has appreciated or depreciated, § 1001(a) of the Code defers the tax consequences of a gain or loss in property until it is realized through the "sale or disposition of [the] property." This rule serves administrative convenience because a change in the investment's form or extent can be easily detected by a taxpayer or an administrative officer.

(b) An exchange of property constitutes a "disposition of property" under § 1001(a) only if the properties exchanged are materially different. Although the statute and its legislative history are silent on the subject, Treasury Regulation § 1.1001-1 includes a material difference requirement for realization to occur through a disposition of property. Treasury Regulation § 1.1001-1 should be given deference as a reasonable interpretation of § 1001(a). Where, as here, a Treasury Regula-

tion long continues without substantial change and applies to a substantially reenacted statute, it is deemed to have congressional approval. The regulation is also consistent with this Court's landmark precedents on realization, which make clear that a taxpayer realizes taxable income only if the properties exchanged are "materially" or "essentially" different. United States v Phellis, 257 US 156, 173, 66 L Ed 180, 42 S Ct 63; Weiss v Stearn, 265 US 242, 253-254, 68 L Ed 1001, 44 S Ct 490, 33 ALR 520; Marr v United States, 268 US 536, 540-542, 69 L Ed 1079, 45 S Ct 575. Since these cases were part of the contemporary legal context in which the substance of § 1001(a) was originally enacted, and since Congress has left their principles undisturbed through subsequent reenactments, it can be presumed that Congress intended to codify these principles in § 1001(a).

(c) Properties are materially different if their respective possessors enjoy legal entitlements that are different in kind or extent. As long as the property entitlements are not identical, their exchange will allow both the Commissioner and the transacting taxpayer to fix the appreciated or depreciated values of the property relative to their tax bases. There is no support in Phellis, Weiss, or Marr for the Commissioner's "economic substitute" concept of material difference, under which differences would be material only when the parties, the relevant market, and the relevant regulatory body would consider them so. Moreover, the complexity of the Commissioner's approach both ill serves the goal of administrative convenience underlying the realization requirement and is incompatible with the Code's structure.

(d) Cottage Savings' transactions easily satisfy the material difference test. Since the participation interests exchanged derived from loans that were made to different obligors and secured by different homes, the exchanged interests embodied legally distinct entitlements. Thus, Cottage Savings realized its losses at the point of the exchange, at which time both it and the Commissioner were in a position to determine the change in the value of its mortgages relative to their tax bases. The mortgages' status under the FHLBB's criteria has no bearing on this conclusion, since a mortgage can be "substantially identical" to the FHLBB and still exhibit "differences" that are "material" for purposes of the Code.

2. Cottage Savings sustained its losses within the meaning of § 165(a) of the Code. The Commissioner's apparent argument that the losses were not bona fide is rejected, since there is no contention that the transaction was not conducted at arm's length or that Cottage Savings retained de facto ownership of the participation interests it traded. Higgins v Smith, 308 US 473, 84 L Ed 406, 60 S Ct 355, distinguished.

890 F2d 848, reversed and remanded.

Marshall, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Stevens, O'Connor, Scalia, Kennedy, and Souter, JJ., joined. Blackmun, J., filed a dissenting opinion, in which White, J., joined.

APPEARANCES OF COUNSEL

Dennis L. Manes argued the cause for petitioner.
John G. Roberts, Jr. argued the cause for respondent.
Briefs of Counsel, p 820, infra.

OPINION OF THE COURT

[499 US 556]

Justice **Marshall** delivered the opinion of the Court.

[1a] The issue in this case is whether a financial institution realizes tax-deductible losses when it exchanges its interests in one group of residential mortgage loans for another lender's interests in a different group of residential mortgage loans. We hold that such a transaction does give rise to realized losses.

I

Petitioner Cottage Savings Association (Cottage Savings) is a savings and loan association (S & L) formerly regulated by the Federal Home Loan Bank Board (FHLBB).[1] Like many S & L's, Cottage Savings held numerous long-term, low-interest mortgages that declined in value when interest rates surged in the late 1970's. These institutions would have benefited from selling their devalued mortgages in order to realize tax-deductible losses. However, they were deterred from doing so by FHLBB accounting regulations, which required them to record the losses on their books.

[499 US 557]

Reporting these losses consistent with the then-effective FHLBB accounting regulations would have placed many S & L's at risk of closure by the FHLBB.

The FHLBB responded to this situation by relaxing its requirements for the reporting of losses. In a regulatory directive known as "Memorandum R-49," dated June 27, 1980, the FHLBB determined that S & L's need not report losses associated with mortgages that are exchanged for "substantially identical" mortgages held by other lenders.[2] The FHLBB's acknowledged purpose for Memorandum R-49 was to facilitate transactions that would generate tax losses but that would not substantially affect the economic position of the transacting S & L's.

This case involves a typical Memorandum R-49 transaction. On December 31, 1980, Cottage Savings sold "90% participation interests" in 252 mortgages to four S & L's. It simultaneously purchased "90% participation interests" in 305 mort-

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1. Congress abolished the FHLBB in 1989. See § 401 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub L 101-73, 103 Stat 354.

2. Memorandum R-49 listed 10 criteria for classifying mortgages as substantially identical.

"The loans involved must:

"1. involve single-family residential mortgages,

"2. be of similar type (e.g., conventionals for conventionals),

"3. have the same stated terms to maturity (e.g., 30 years),

"4. have identical stated interest rates,

"5. have similar seasoning (i.e., remaining terms to maturity),

"6. have aggregate principal amounts within the lesser of 2½% or $100,000 (plus or minus) on both sides of the transaction, with any additional consideration being paid in cash,

"7. be sold without recourse,

"8. have similar fair market values,

"9. have similar loan-to-value ratios at the time of the reciprocal sale, and

"10. have all security properties for both sides of the transaction in the same state." Record, Exh. 72-BT.

gages held by these S & L's.[3] All of the loans involved

[499 US 558]

in the transaction were secured by single-family homes, most in the Cincinnati area. The fair market value of the package of participation interests exchanged by each side was approximately $4.5 million. The face value of the participation interests Cottage Savings relinquished in the transaction was approximately $6.9 million. See 90 T C 372, 378-382 (1988).

On its 1980 federal income tax return, Cottage Savings claimed a deduction for $2,447,091, which represented the adjusted difference between the face value of the participation interests that it traded and the fair market value of the participation interests that it received. As permitted by Memorandum R-49, Cottage Savings did not report these losses to the FHLBB. After the Commissioner of Internal Revenue disallowed Cottage Savings' claimed deduction, Cottage Savings sought a redetermination in the Tax Court. The Tax Court held that the deduction was permissible. See 90 T C 372 (1988).

On appeal by the Commissioner, the Court of Appeals reversed. 890 F2d 848 (CA6 1989). The Court of Appeals agreed with the Tax Court's determination that Cottage Savings had realized its losses through the transaction. See id., at 852. However, the court held that Cottage Savings was not entitled to a deduction because its losses were not "actually" sustained during the 1980 tax year for purposes of 26 USC § 165(a) [26 USCS § 165(a)]. See 890 F2d, at 855.

Because of the importance of this issue to the S & L industry and the conflict among the Circuits over whether Memorandum R-49 exchanges produce deductible tax losses,[4] we granted certiorari. 498 US 808, 112 L Ed 2d 17, 111 S Ct 40 (1990). We now reverse.

[499 US 559]

II

[2] Rather than assessing tax liability on the basis of annual fluctuations in the value of a taxpayer's property, the Internal Revenue Code defers the tax consequences of a gain or loss in property value until the taxpayer "realizes" the gain or loss. The realization requirement is implicit in § 1001(a) of the Code, 26 USC § 1001(a) [26 USCS § 1001(a)], which defines "[t]he gain [or loss] from the sale or other disposition of property" as the difference between "the amount realized" from the sale or disposition of the property and its "adjusted basis." As this Court has recognized, the concept of realization is "founded on administrative convenience." Helvering v Horst, 311 US 112, 116, 85 L Ed 75, 61 S Ct 144, 131 ALR 655 (1940). Under an appreciation-based system of taxation, taxpayers and the Commissioner would have to undertake the "cum-

3. By exchanging merely participation interests rather than the loans themselves, each party retained its relationship with the individual obligors. Consequently, each S & L continued to service the loans on which it had transferred the participation interests and made monthly payments to the participation-interest holders. See 90 TC 372, 381 (1988).

4. The two other Courts of Appeals that have considered the tax treatment of Memorandum R-49 transactions have found that these transactions do give rise to deductible losses. See Federal Nat. Mortgage Assn. v Commissioner, 283 US App DC 53, 56-58, 896 F2d 580, 583-584 (1990); San Antonio Savings Assn. v Commissioner, 887 F2d 577 (CA5 1989).

bersome, abrasive, and unpredictable administrative task" of valuing assets on an annual basis to determine whether the assets had appreciated or depreciated in value. See 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 5.2, p 5-16 (2d ed 1989). In contrast, "[a] change in the form or extent of an investment is easily detected by a taxpayer or an administrative officer." R. Magill, Taxable Income 79 (rev ed 1945).

Section 1001(a)'s language provides a straightforward test for realization: to realize a gain or loss in the value of property, the taxpayer must engage in a "sale or other disposition of [the] property." The parties agree that the exchange of participation interests in this case cannot be characterized as a "sale" under § 1001(a); the issue before us is whether the transaction constitutes a "disposition of property." The Commissioner argues that an exchange of property can be treated as a "disposition" under § 1001(a) only if the properties exchanged are materially different. The Commissioner further submits that, because the underlying mortgages

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were essentially economic substitutues, the participation interests exchanged by Cottage Savings were not materially different from those received from the other S & L's. Cottage Savings, on the other hand, maintains that *any* exchange of property is a "disposition of property" under § 1001(a), regardless of whether the property exchanged is materially different. Alternatively, Cottage Savings contends that the participation interests exchanged were materially different because the underlying loans were secured by different properties.

We must therefore determine whether the realization principle in § 1001(a) incorporates a "material difference" requirement. If it does, we must further decide what that requirement amounts to and how it applies in this case. We consider these questions in turn.

A

[3a] Neither the language nor the history of the Code indicates whether and to what extent property exchanged must differ to count as a "disposition of property" under § 1001(a). Nonetheless, we readily agree with the Commissioner that an exchange of property gives rise to a realization event under § 1001(a) only if the properties exchanged are "materially different." The Commissioner himself has by regulation construed § 1001(a) to embody a material difference requirement:

> "Except as otherwise provided . . . the gain or loss realized from the conversion of property into cash, *or from the exchange of property for other property differing materially either in kind or in extent,* is treated as income or as loss sustained." Treas Reg § 1.1001-1, 26 CFR § 1.1001-1 (1990) (emphasis added).

Because Congress has delegated to the Commissioner the power to promulgate "all needful rules and regulations for the enforcement of [the Internal Revenue Code]," 26 USC § 7805(a) [26 USCS § 7805(a)], we must defer to his regulatory interpretations

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of the Code so long as they are reasonable, see National Muffler Dealers Assn., Inc. v United States, 440 US 472, 476-477, 59 L Ed 2d 519, 99 S Ct 1304 (1979).

We conclude that Treasury Regu-

lation § 1.1001-1 *is* a reasonable interpretation of § 1001(a). Congress first employed the language that now comprises § 1001(a) of the Code in § 202(a) of the Revenue Act of 1924, ch 234, 43 Stat 253; that language has remained essentially unchanged through various reenactments.[5] And since 1934, the Commissioner has construed the statutory term "disposition of property" to include a "material difference" requirement.[6] As we have recognized, " 'Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have received congressional approval and have the effect of law.' " United States v Correll, 389 US 299, 305-306, 19 L Ed 2d 537, 88 S Ct 445 (1967), quoting Helvering v Winmill, 305 US 79, 83, 83 L Ed 52, 59 S Ct 45 (1938).

Treasury Regulation § 1.001-1 is also consistent with our landmark precedents on realization. In a series of early decisions involving the tax effects of property exchanges, this Court made clear that a taxpayer realizes taxable income

[499 US 562]

only if the properties exchanged are "materially" or "essentially" different. See United States v Phellis, 257 US 156, 173, 66 L Ed 180, 42 S Ct 63 (1921); Weiss v Stearn, 265 US 242, 253-254, 68 L Ed 1001, 44 S Ct 490, 33 ALR 520 (1924); Marr v United States, 268 US 536, 540-542, 69 L Ed 1079, 45 S Ct 575 (1925); see also Eisner v Macomber, 252 US 189, 207-212, 64 L Ed 521, 40 S Ct 189, 9 ALR 1570 (1920) (recognizing realization requirement). Because these decisions were part of the "contemporary legal context" in which Congress enacted § 202(a) of the 1924 Act, see Cannon v University of Chicago, 441 US 677, 698-699, 60 L Ed 2d 560, 99 S Ct 1946 (1979), and because Congress has left undisturbed through subsequent reenactments of the Code the principles of realization established in these cases, we may presume that Congress intended to codify these principles in § 1001(a), see Pierce v Underwood, 487 US 552, 567, 101 L Ed 2d 490, 108 S Ct 2541 (1988); Lorillard v Pons, 434 US 575, 580-581, 55 L Ed 2d 40, 98 S Ct 866 (1978). The Commissioner's construction of the statutory language to incorporate these principles certainly was reasonable.

B

Precisely what constitutes a "material difference" for purposes of § 1001(a) of the Code is a more complicated question. The Commissioner argues that properties are "materially different" only if they differ in economic substance. To determine

5. Section 202(a) of the 1924 Act provided:

"Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized." The essence of this provision was reenacted in § 111(a) of Revenue Act of 1934, ch 277, 48 Stat 703; and then in § 111(a) of the Internal Revenue Code of 1939, ch 1, 53 Stat 37; and finally in § 1001(a) of the Internal Revenue Code of 1954, Pub L 591, 68A Stat 295.

6. What is now Treas Reg § 1.1001-1 originated as Treas Reg 86, Art 111-1, which was promulgated pursuant to the Revenue Act of 1934. That regulation provided:

"Except as otherwise provided, the Act regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, *or from the exchange of property for other property differing materially either in kind or in extent*" (emphasis added).

whether the participation interests exchanged in this case were "materially different" in this sense, the Commissioner argues, we should look to the attitudes of the parties, the evaluation of the interests by the secondary mortgage market, and the views of the FHLBB. We conclude that § 1001(a) embodies a much less demanding and less complex test.

[4a] Unlike the question *whether* § 1001(a) contains a material difference requirement, the question of *what constitutes* a material difference is not one on which we can defer to the Commissioner. For the Commissioner has not issued an authoritative, prelitigation interpretation of what property

[499 US 563]

exchanges satisfy this requirement.[7] Thus, to give meaning to the material difference test, we must look to the case law from which the test derives and which we believe Congress intended to codify in enacting and reenacting the language that now comprises § 1001(a). See Lorillard v Pons, supra, at 580-581, 55 L Ed 2d 40, 98 S Ct 866.

We start with the classic treatment of realization in Eisner v Macomber, supra. In Macomber, a taxpayer who owned 2,200 shares of stock in a company received another 1,100 shares from the company as part of a pro rata stock dividend meant to reflect the company's growth in value. At issue was whether the stock dividend constituted taxable income. We held that it did not, because no gain was realized. See id., at 207-212, 64 L Ed 521, 40 S Ct 189, 9 ALR 1570. We reasoned that the stock dividend merely reflected the increased worth of the taxpayer's stock, see id., at 211-212, 64 L Ed 521, 40 S Ct 189, 9 ALR 1570, and that a taxpayer realizes increased worth of property only by receiving "something of exchangeable value *proceeding from* the property," see id., at 207, 64 L Ed 521, 40 S Ct 189, 9 ALR 1570.

In three subsequent decisions—United States v Phellis, supra; Weiss v Stearn, supra; and Marr v United States, supra—we refined Macomber's conception of realization in the context of property exchanges. In each case, the taxpayer owned stock that had appreciated in value since its acquisition.

[499 US 564]

And in each case, the corporation in which the taxpayer held stock had reorganized into a new corporation, with the new corporation assuming the business of the old corporation. While the corporations in Phellis and Marr both changed from New Jersey to Delaware corporations, the original and successor corporations in Weiss both were incorporated in Ohio. In each

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7. **[4b]** In its brief in United States v Centennial Savings Bank FSB; No. 89-1926, the Commissioner cites two Revenue Rulings that support the position that mortgages exchanged through reciprocal mortgage sales are not materially different. See Brief for United States 25, n 21 (citing Rev Rul 85-125, 1985-2 Cum Bull 180; Rev 81-204, 1981-2 Cum Bull 157). Perhaps because the two Revenue Rulings postdate the reciprocal mortgage exchange transaction at issue here and do not purport to define the "differ materially" language in Treasury Regulation § 1.1001-1, the Commissioner has not argued that the position taken in these rulings is entitled to deference. Compare, e. g., National Muffler Dealers Assn., Inc. v United States, 440 US 472, 483-484, and nn 16-19, 59 L Ed 2d 519, 99 S Ct 1304 (1979) (deferring to position reflected in longstanding series of Revenue Rulings consistently adhering to same position in a variety of fact patterns). See generally Udall v Tallman, 380 US 1, 16-17, 13 L Ed 2d 616, 85 S Ct 792 (1965) (agency's reasonable interpretation of its own regulations is entitled to deference).

case, following the reorganization, the stockholders of the old corporation received shares in the new corporation equal to their proportional interest in the old corporation.

The question in these cases was whether the taxpayers realized the accumulated gain in their shares in the old corporation when they received in return for those shares stock representing an equivalent proportional interest in the new corporations. In Phellis and Marr, we held that the transactions were realization events. We reasoned that because a company incorporated in one State has "different rights and powers" from one incorporated in a different State, the taxpayers in Phellis and Marr acquired through the transactions property that was "materially different" from what they previously had. United States v Phellis, 257 US, at 169-173, 66 L Ed 180, 42 S Ct 63; see Marr v United States, supra, at 540-542, 69 L Ed 1079, 45 S Ct 575 (using phrase "essentially different"). In contrast, we held that no realization occurred in Weiss. By exchanging stock in the predecessor corporation for stock in the newly reorganized corporation, the taxpayer did not receive "a thing really different from what he theretofore had." Weiss v Stearn, supra, at 254, 68 L Ed 1001, 44 S Ct 490, 33 ALR 520. As we explained in Marr, our determination that the reorganized company in Weiss was not "really different" from its predecessor turned on the fact that both companies were incorporated in the same State. See Marr v United States, supra, at 540-542, 69 L Ed 1079, 45 S Ct 575 (outlining distinction between these cases).

[5a, 6] Obviously, the distinction in Phellis and Marr that made the stock in the successor corporations materially different from the stock in the predecessors was minimal. Taken together,

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Phellis, Marr, and Weiss stand for the principle that properties are "different" in the sense that is "material" to the Internal Revenue Code so long as their respective possessors enjoy legal entitlements that are different in kind or extent. Thus, separate groups of stock are not materially different if they confer "the same proportional interest of the same character in the same corporation." Marr v United States, 268 US, at 540, 69 L Ed 1079, 45 S Ct 575. However, they *are* materially different if they are issued by different corporations, id., at 541, 69 L Ed 1079, 45 S Ct 575; United States v Phellis, supra, at 173, 66 L Ed 180, 42 S Ct 63, or if they confer "differen[t] rights and powers" in the same corporation, Marr v United States, supra, at 541, 69 L Ed 1079, 45 S Ct 575. No more demanding a standard than this is necessary in order to satisfy the administrative purposes underlying the realization requirement in § 1001(a). See Helvering v Horst, 311 US, at 116, 85 L Ed 75, 61 S Ct 144, 131 ALR 655. For, as long as the property entitlements are not identical, their exchange will allow both the Commissioner and the transacting taxpayer easily to fix the appreciated or depreciated values of the property relative to their tax bases.

[5b] In contrast, we find no support for the Commissioner's "economic substitute" conception of material difference. According to the Commissioner, differences between properties are material for purposes of the Code only when it can be said that the parties, the relevant market (in this case the secondary mortgage

market), and the relevant regulatory body (in this case the FHLBB) would consider them material. Nothing in Phellis, Weiss, and Marr suggests that exchanges of properties must satisfy such a subjective test to trigger realization of a gain or loss.

Moreover, the complexity of the Commissioner's approach ill serves the goal of administrative convenience that underlies the realization requirement. In order to apply the Commissioner's test in a principled fashion, the Commissioner and the taxpayer must identify the relevant market, establish whether there is a regulatory agency whose views should be taken into account, and then assess how the relevant market

[499 US 566]

participants and the agency would view the transaction. The Commissioner's failure to explain how these inquiries should be conducted further calls into question the workability of his test.

Finally, the Commissioner's test is incompatible with the structure of the Code. Section 1001(c) of Title 26 provides that a gain or loss realized under § 1001(a) "shall be recognized" unless one of the Code's nonrecognition provisions applies. One such nonrecognition provision withholds recognition of a gain or loss realized from an exchange of properties that would appear to be economic substitutes under the Commissioner's material difference test. This provision, commonly known as the "like kind" exception, withholds recognition of a gain or loss realized "on the exchange of property held for productive use in a trade or business or for investment . . . for property of like kind which is to be held either for productive use in a trade or business or for investment." 26 USC § 1031(a)(1) [26 USCS § 1031(a)(1)]. If Congress had expected that exchanges of similar properties would *not* count as realization events under § 1001(a), it would have had no reason to bar recognition of a gain or loss realized from these transactions.

C

[1b, 3b, 5c] Under our interpretation of § 1001(a), an exchange of property gives rise to a realization event so long as the exchanged properties are "materially different"—that is, so long as they embody legally distinct entitlements. Cottage Savings' transactions at issue here easily satisfy this test. Because the participation interests exchanged by Cottage Savings and the other S & L's derived from loans that were made to different obligors and secured by different homes, the exchanged interests did embody legally distinct entitlements. Consequently, we conclude that Cottage Savings realized its losses at the point of the exchange.

[1c] The Commissioner contends that it is anomalous to treat mortgages deemed to be "substantially identical" by the

[499 US 567]

FHLBB as "materially different." The anomaly, however, is merely semantic; mortgages can be substantially identical for Memorandum R-49 purposes and still exhibit "differences" that are "material" for purposes of the Internal Revenue Code. Because Cottage Savings received entitlements different from those it gave up, the exchange put both Cottage Savings and the Commissioner in a position to determine the change in the value of Cottage Savings' mortgages relative to their tax bases. Thus, there is no reason not to treat the exchange of these interests as a realization

event, regardless of the status of the mortgages under the criteria of Memorandum R-49.

III

[1d] Although the Court of Appeals found that Cottage Savings' losses were realized, it disallowed them on the ground that they were not sustained under § 165(a) of the Code, 26 USC § 165(a) [26 USCS § 165(a)]. Section 165(a) states that a deduction shall be allowed for "any loss sustained during the taxable year and not compensated for by insurance or otherwise." Under the Commissioner's interpretation of § 165(a),

> "To be allowable as a deduction under section 165(a), a loss must be evidenced by closed and completed transactions, fixed by identifiable events, and, except as otherwise provided in section 165(h) and § 1.165-11, relating to disaster losses, actually sustained during the taxable year. Only a bona fide loss is allowable. Substance and not mere form shall govern in determining a deductible loss." Treas Reg § 1.165-1(b), 26 CFR § 1.165-1(b) (1990).

The Commissioner offers a minimal defense of the Court of Appeals' conclusion. The Commissioner contends that the losses were not sustained because they lacked "economic substance," by which the Commissioner seems to mean that the losses were not bona fide. We say "seems" because the Commissioner states the position in one sentence in a footnote

[499 US 568]

in his brief without offering further explanation. See Brief for Respondent 34-35, n 39. The only authority the Commissioner cites for argument is Higgins v Smith, 308 US 473, 84 L Ed 406, 60 S Ct 355 (1939). See Brief for United States in No. 89-1926, p 16, n 11.

In Higgins, we held that a taxpayer did not sustain a loss by selling securities below cost to a corporation in which he was the sole shareholder. We found that the losses were not bona fide because the transaction was not conducted at arm's length and because the taxpayer retained the benefit of the securities through his wholly owned corporation. See Higgins v Smith, supra, at 475-476, 84 L Ed 406, 60 S Ct 355. Because there is no contention that the transactions in this case were not conducted at arm's length, or that Cottage Savings retained de facto ownership of the participation interests it traded to the four reciprocating S & L's, Higgins is inapposite. In view of the Commissioner's failure to advance any other arguments in support of the Court of Appeals' ruling with respect to § 165(a), we conclude that, for purposes of this case, Cottage Savings sustained its losses within the meaning of § 165(a).

IV

For the reasons set forth above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

SEPARATE OPINION

Justice **Blackmun,** with whom Justice **White** joins, concurring in part and dissenting in part in No. 89-1926, and dissenting in No. 89-1965.*

I agree that the early withdrawal penalties collected by Centennial Savings Bank FSB do not constitute "income by reason of the discharge . . . of indebtedness of the taxpayer," within the meaning of 26 USC § 108(a)(1) (1982 ed) [26 USCS § 108(a)(1)], and that the penalty amounts are not excludable from Centennial's gross income. I therefore join Part III of the Court's opinion in No. 89-1926.

[499 US 569]

I dissent, however, from the Court's conclusions in these two cases that Centennial and Cottage Savings Association realized deductible losses for income tax purposes when each exchanged partial interests in one group of residential mortgage loans for partial interests in another like group of residential mortgage loans. I regard these losses as not recognizable for income tax purposes because the mortgage packages so exchanged were substantially identical and were not materially different.

The exchanges, as the Court acknowledges, were occasioned by Memorandum R-49, Record, Exh 72-8T, issued by the Federal Home Loan Bank Board (FHLBB) on June 27, 1980, and by that Memorandum's relaxation of theretofore-existing accounting regulations and requirements, a relaxation effected to avoid placement of "many S & L's at risk of closure by the FHLBB" without substantially affecting the "economic position of the transacting S & L's." Ante, at 557, 113 L Ed 2d, at 597. But the Memorandum, the Court notes, also had as a purpose the "facilit[ation of] transactions that would generate tax losses." Ibid. I find it somewhat surprising that an agency not responsible for tax matters would presume to dictate what is or is not a deductible loss for federal income tax purposes. I had thought that that was something within the exclusive province of the Internal Revenue Service, subject to administrative and judicial review. Certainly, the FHLBB's opinion in this respect is entitled to no deference whatsoever. See United States v Stewart, 311 US 60, 70, 85 L Ed 40, 61 S Ct 102 (1940); Graff v Commissioner, 673 F2d 784, 786 (CA5 1982) (concurring opinion). The Commissioner, of course, took the opposing position. See Rev Rul 85-125, 1985-2 Cum Bull 180; Rev Rul 81-204, 1981-2 Cum Bull 157.

It long has been established that gain or loss in the value of property is taken into account for income tax purposes only if and when the gain or loss is "realized," that is, when it is tied to a realization event, such as the sale, exchange, or other disposition of the property. Mere variation in value—the

[499 US 570]

routine ups and downs of the marketplace—do not in themselves have income tax consequences. This is fundamental in income tax law.

In applying the realization requirement to an exchange, the properties involved must be materially

* Editor's Note: This opinion applies also to United States v Centennial Savings Bank FSB (No. 89-1926), 113 L Ed 2d, at page 608, infra.

different in kind or in extent. Treas Reg § 1.1001-1(a), 26 CFR § 1.1001-1(a) (1990). This has been the rule recognized administratively at least since 1935, see Treas Regs 86, Art 111-1, issued under the Revenue Act of 1934, and by judicial decision. See, e.g., Mutual Loan & Savings Co. v Commissioner, 184 F2d 161 (CA5 1950). See also Marr v United States, 268 US 536, 541, 69 L Ed 1079, 45 S Ct 575 (1925); Weiss v Stearn, 265 US 242, 254, 68 L Ed 1001, 44 S Ct 490, 33 ALR 520 (1924); United States v Phellis, 257 US 156, 66 L Ed 180, 42 S Ct 63 (1921). This makes economic as well as tax sense, for the parties obviously regard the exchanged properties as having equivalent values. In tax law, we should remember, substance rather than form determines tax consequences. Commissioner v Court Holding Co. 324 US 331, 334, 89 L Ed 981, 65 S Ct 707 (1945); Gregory v Helvering, 293 US 465, 469-470, 79 L Ed 596, 55 S Ct 266, 97 ALR 1355 (1935); Shoenberg v Commissioner, 77 F2d 446, 449 (CA8), cert denied, 296 US 586, 80 L Ed 414, 56 S Ct 101 (1935). Thus, the resolution of the exchange issue in these cases turns on the "materially different" concept. The Court recognizes as much. Ante, at 559-560, 113 L Ed 2d, at 599.

That the mortgage participation partial interests exchanged in these cases were "different" is not in dispute. The materiality prong is the focus. A material difference is one that has the capacity to influence a decision. See, e.g., Kungys v United States, 485 US 759, 770-771, 99 L Ed 2d 839, 108 S Ct 1537 (1988); Basic Inc. v Levinson, 485 US 224, 240, 99 L Ed 2d 194, 108 S Ct 978 (1988); TSC Industries, Inc. v Northway, Inc. 426 US 438, 449, 48 L Ed 2d 757, 96 S Ct 2126 (1976).

The application of this standard leads, it seems to me, to only one answer—that the mortgage participation partial interests released were not materially different from the mortgage participation partial interests received. Memorandum R-49, as the Court notes, ante, at 557, n 2, 113 L Ed 2d, at 597, lists 10 factors that, when satisfied, as they were here, serve to classify the

[499 US 571]

interests as "substantially identical." These factors assure practical identity; surely, they then also assure that any difference cannot be of consequence. Indeed, nonmateriality is the full purpose of the Memorandum's criteria. The "proof of the pudding" is in the fact of its complete accounting acceptability to the FHLBB. Indeed, as has been noted, it is difficult to reconcile substantial identity for financial accounting purposes with a material difference for tax accounting purposes. See First Federal Savings & Loan Assn. of Temple v United States, 694 F Supp 230, 245 (WD Tex 1988), aff'd, 887 F2d 593 (CA5 1989), cert pending No. 89-1927. Common sense so dictates.

This should suffice and be the end of the analysis. Other facts, however, solidify the conclusion: The retention by the transferor of 10% interests, enabling it to keep on servicing its loans; the transferor's continuing to collect the payments due from the borrowers so that, so far as the latter were concerned, it was business as usual, exactly as it had been; the obvious lack of concern or dependence of the transferor with the "differences" upon which the Court re-

lies (as transferees, the taxpayers made no credit checks and no appraisals of collateral, see 890 F2d 848, 849 (CA6 1989)); 90 TC 372, 382 (1988); 682 F Supp 1389, 1392 (ND Tex 1988); the selection of the loans by a computer programmed to match mortgages in accordance with the Memorandum R-49 criteria; the absence of even the names of the borrowers in the closing schedules attached to the agreements; Centennial's receipt of loan files only six years after its exchange, id., at 1392, n 5; the restriction of the interests exchanged to the same State; the identity of the respective face and fair market values; and the application by the parties of common discount factors to each side of the transaction—all reveal that any differences that might exist made no difference whatsoever and were not material. This demonstrates the real nature of the transactions, including nonmateriality of the claimed differences.

[499 US 572]

We should be dealing here with realities and not with superficial distinctions. As has been said many times, and as noted above, in income tax law we are to be concerned with substance and not with mere form. When we stray from that principle, the new precedent is likely to be a precarious beacon for the future.

I respectfully dissent on this issue.

[499 US 573]

UNITED STATES, Petitioner

v

CENTENNIAL SAVINGS BANK FSB (RESOLUTION TRUST CORPORATION, Receiver)

499 US 573, 113 L Ed 2d 608, 111 S Ct 1512

[No. 89-1926]

Argued January 15, 1991. Decided April 17, 1991.

Decision: Financial institution held (1) to realize tax-deductible losses on exchange of interests in mortgage loans, and (2) not entitled to exclude depositors' early withdrawal penalties from taxable income.

SUMMARY

In the 1981 tax year, a mutual savings and loan institution that at the time was regulated by the Federal Home Loan Bank Board (FHLBB) (later abolished) exchanged 90-percent participation interests in a group of mortgage loans held by the institution for 90-percent participation interests in a group of mortgage loans held by the Federal National Mortgage Association (FNMA), where, by exchanging merely participation interests, each party retained its relationship with the obligors of the exchanged loans. The loans relinquished by the institution were secured by properties located primarily in northern Texas, while the loans relinquished by FNMA were secured by properties located throughout Texas. Each group of loans had a face value of approximately $8.5 million and a fair market value of approximately $5.7 million, and although the exchange was structured to be substantially identical for FHLBB accounting purposes, and thus did not generate losses for FHLBB regulatory purposes, the institution claimed a deduction on its 1981 federal income tax return for the difference between the face value—which equaled the cost basis—of the mortgage interests it surrendered in the exchange and the market value of the mortgage interests it received in return. Also in the 1981 tax year, the institution collected early withdrawal penalties from depositors who prematurely terminated their federally insured certificate of deposit (CD) accounts, where each CD agreement had established a fixed-term, fixed-interest account and, consistent with federal regulations, also had provided that the depositor would be required to pay a

Briefs of Counsel, p 820, infra.

penalty to the institution if the depositor withdrew the principal before maturity. On its 1981 federal income tax return, the institution treated the withdrawal penalties as excludible from gross income, under 26 USCS § 108(a)(1), as income "by reason of the discharge . . . of indebtedness." After the Internal Revenue Service disallowed the deduction of the losses claimed with respect to the exchange of mortgage loan interests and determined that the institution should have declared as income in 1981 the early withdrawal penalties collected during that year, the institution paid the resulting deficiencies and brought a refund action in the United States District Court for the Northern District of Texas. The District Court entered judgment for the United States on the issue concerning the mortgage interests, and for the institution on the issue concerning the early withdrawal penalties (682 F Supp 1389). The United States Court of Appeals for the Fifth Circuit reversed the District Court judgment concerning the mortgage interests and affirmed the District Court judgment concerning the early withdrawal penalties (887 F2d 595). The Court of Appeals held that (1) because the two groups of mortgages, as a result of being secured by different residential properties, were materially different for federal income tax purposes, the exchange of mortgage interests gave rise to a realization event allowing the institution immediately to recognize its losses on the exchange, and (2) the early withdrawal penalties constituted income from the discharge of indebtedness, because the penalties reduced the size of the institution's obligation to its depositors.

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by MARSHALL, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., and expressing the unanimous view of the court as to holding 2 below, it was held that (1) the institution's losses on the exchange of mortgage interests were deductible in 1981, because the exchange gave rise to a realization event for purposes of § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a))—which defines the gain or loss from the sale or other disposition of property as the difference between the amount realized from the disposition and the adjusted basis of the property—since the exchanged properties, by consisting of interests in loans made to different obligors and secured by different properties, embodied legally distinct entitlements and thus were materially different; and (2) the early withdrawal penalties were not excludible from income under 26 USCS § 108(a)(1), because (a) as used in § 108, the term "discharge of indebtedness" conveys forgiveness of, or release from, an obligation to repay, (b) a depositor who prematurely closes an account and receives an amount equal to the principal and accrued interest minus the early withdrawal penalty receives exactly what the institution is obligated to pay, and thus does not "discharge" the institution from an obligation, (c) the purpose underlying § 108 is to mitigate the effect of treating the discharge of indebtedness as income so that businesses will not be discouraged from repurchasing or liquidating their debts at less than face value, (d) unlike a debtor who can take advantage of § 108 by planning for the effects of liquidation of an obligation, the institution in this case had no control over whether and when the obligations would be liquidated, and (e) tax-exemption and tax-deferral provisions are to be construed narrowly.

BLACKMUN, J., joined by WHITE, J., concurring in part and dissenting in part in an opinion appearing in Cottage Savings Association v Commissioner of Internal Revenue, 113 L Ed 2d, at page 605, supra, (1) agreed with the court's opinion that the early withdrawal penalties collected by the institution were not excludible from gross income, under § 108(a), as income by reason of the discharge of indebtedness, but (2) expressed the view that the institution did not realize income-tax-deductible losses from the exchange of mortgage loan interests, because the interests released by the institution were not materially different from those received, since (a) the mortgages were substantially identical for FHLBB accounting purposes, and (b) the parties' handling of the exchange and of the mortgage loans after completion of the exchange revealed that any differences that might exist were not material.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Income Taxes §§ 126, 137 — disposition of property — deductibility of losses — mortgage loans — partial participation interest

1a-1d. A mutual savings and loan institution regulated by the Federal Home Loan Bank Board (FHLBB) (later abolished) realizes deductible losses for the federal income tax year in which it exchanges 90-percent participation interests in a group of mortgage loans that are secured by residential properties located primarily in the northern part of a state for 90-percent participation interests in a group of mortgage loans that are held by another lender and secured by residential

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

34 Am Jur 2d, Federal Taxation §§ 4000-4003, 4050, 4051, 5346, 5356, 6576, 6578

20 Am Jur Trials 255, Preparing a Federal Income Tax Case for Trial

26 USCS §§ 108(a)(1), 1001(a)

RIA Federal Tax Coordinator 2d ¶¶ I-1950, I-1952, I-2001, I-2201, I-2202, J-7002, J-7007

L Ed Digest, Income Taxes §§ 38, 126, 137

L Ed Index, Debtor and Creditor; Exchange of Property; Income Taxes

Index to Annotations, Discharge or Release; Exchange of Property; Income Tax; Sale and Transfer of Property

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Modern status of rule dealing with public policy as ground for denying deduction for federal income tax purposes. 16 L Ed 2d 1117; 27 ALR2d 498.

Cancellation, forgiveness, or compromise of debt or of interest thereon, as taxable income of debtor. 87 L Ed 792, 93 L Ed 491.

Federal income tax: Year in which guarantor may take loss or bad debt deduction. 23 ALR2d 491.

Income tax: Cancellation of debt upon payment of less than amount due, or purchase by debtor of own obligation at a discount, as creating taxable income. 7 ALR2d 871.

properties located throughout the state—where (1) by exchanging merely participation interests, each party retains its relationship with the obligors of the exchanged loans, (2) each group of loans has a face value of approximately $8.5 million and a fair market value of approximately $5.7 million, (3) the exchange is structured so that the respective mortgage packages are substantially identical for FHLBB accounting purposes and thus do not generate accounting losses for FHLBB regulatory purposes, and (4) the institution claims a deduction on its tax return for the difference between the face value, which is the cost basis, of the mortgage interests surrendered by the institution and the market value of the interests received in return—because (1) a property exchange gives rise to a realization event for purposes of § 1001(a) of the Internal Revenue Code (26 USCS § 1001(a)), which defines the gain or loss from the sale or other disposition of property as the difference between the amount realized from the disposition and the adjusted basis of the property, so long as the exchanged properties are materially different, (2) such properties are different in the sense material to the Code so long as they embody legally distinct entitlements, and (3) the participation interests exchanged by the parties embody legally distinct entitlements, since the interests are in loans made to different obligors and secured by different properties. (Blackmun and White, JJ., dissented from this holding.)

Income Taxes § 38; Internal Revenue § 1.5 — excludibility from gross income — discharge of indebtedness — certificates of deposit — early withdrawal penalties

2a-2g. Early withdrawal penalties collected by a savings and loan institution during the federal income tax year from its depositors who prematurely terminated their certificate of deposit (CD) accounts—where each CD agreement establishes a fixed-term, fixed-interest account and, consistent with federal regulations, also provides that the depositor will be entitled to only the principal and accrued interest less the applicable penalty if the depositor withdraws the principal before maturity—are not excludible from gross income, under 26 USCS § 108(a)(1) (later amended), as income by reason of the discharge of indebtedness, because (1) as used in § 108, the term "discharge of indebtedness" conveys forgiveness of, or release from, an obligation to repay, since (a) § 108 uses "income by reason of the discharge . . . of indebtedness" to refer to the change in the debtor's financial condition when the debtor is no longer legally required to satisfy the debt either in part or in full, and (b) a "discharge" in this sense can occur only if the creditor cancels or forgives a repayment obligation; (2) a depositor who prematurely closes an account and pays the early withdrawal penalty does not "discharge" the institution from an obligation when the institution accepts an amount equal to the principal and accrued interest minus the penalty, since this is exactly what the institution is obligated to pay under the terms of the CD agreement; (3) this common-sense reading of the statutory language best comports with the purpose underlying § 108, which purpose is to mitigate the effect of treating the discharge of indebtedness, which does not necessarily generate cash, as income so that the

prospect of immediate tax liability will not discourage businesses from taking advantage of opportunities to repurchase or liquidate their debts at less than face value; (4) unlike a debtor who negotiates in advance the circumstances in which the debtor will liquidate a debt for less than its face value and thus is in a position to anticipate the need for cash with which to pay the resulting income tax and in a position to negotiate the terms of the anticipated liquidation accordingly, the institution in this case had no discretion to take the tax effects of the early withdrawals into account before liquidating the debt obligations at less than face value, since the institution was committed to releasing the deposits at the sole election of the depositors; and (5) the conclusion that Congress did not intend to extend the benefits of § 108 beyond the setting in which a creditor agrees to release a debtor from an obligation assumed at the outset of the relationship is consistent with the rule that tax-exemption and tax-deferral provisions are to be construed narrowly.

Income Taxes § 38 — certificate of deposit — early withdrawal penalty — income taxable

3. The existence of a "spread" between the debt assumed by a financial institution when a depositor opens a certificate of deposit account with the institution and the amount paid by the institution to the depositor when the depositor terminates the account before the certificate matures—which spread is created by the fact that, by paying the depositor the principal plus accrued interest less the early withdrawal penalty imposed by federal regulation, the institution satisfies the debt for less than the amount of the original debt —is sufficient to demonstrate that the institution has enjoyed an accession to federally taxable income equal in size to the amount of the penalty.

Income Taxes § 38 — excludibility from gross income — discharge of indebtedness

4. In order for a court to determine whether a debtor has realized income by reason of the discharge of indebtedness, which income is excludible from the gross income of certain types of taxpayers under 26 USCS § 108(a)(1), it is necessary for the court to look at both the end result of the transaction and the repayment terms agreed to by the parties at the outset of the debtor-creditor relationship.

Income Taxes § 38 — discharge of indebtedness — performance of separate obligation

5a, 5b. For purposes of 26 USCS § 108(a)(1)—which, for certain types of taxpayers, excludes income from the discharge of indebtedness from gross income—when a creditor discharges a debtor's obligation in exchange for services or some other form of nonmonetary consideration, the debt is not forgiven, but is satisfied in full through the debtor's performance of a separate obligation; discharge of the debt is merely the medium of payment for that performance and must be treated as ordinary income for federal tax purposes.

Appeal § 1662 — issue decided on other grounds

6a, 6b. For purposes of determining whether early withdrawal penalties collected by a savings and loan institution during the federal income tax year from its depositors who prematurely terminated their certifi-

cate of deposit accounts are excludible from gross income, under 26 USCS § 108(a)(1) (later amended), as income by reason of the discharge of indebtedness, the United States Supreme Court need not consider whether the early withdrawal penalties were actually payments for services unrelated to the debtor-creditor relationship, where the court concludes that the institution's reliance on § 108 fails because of the absence of a "discharge" for purposes of § 108.

Income Taxes §§ 38, 40 — income taxable — borrowed funds — release from obligation to repay

7. Borrowed funds are excluded from income for federal tax purposes in the first instance because the taxpayer's obligation to repay the funds offsets any increase in the taxpayer's assets; if the taxpayer is thereafter released from the obligation to repay the funds, the taxpayer enjoys a net increase in assets equal to the forgiven portion of the debt, and the basis for the original exclusion thus evaporates.

SYLLABUS BY REPORTER OF DECISIONS

During the 1981 tax year, respondent Centennial Savings Bank FSB exchanged participation interests in a set of mortgage loans for interests in a different set of mortgage loans held by another lender. All of the loans were secured by residential properties and had a face value substantially higher than their fair market value. In a separate set of transactions, Centennial collected early withdrawal penalties from customers who prematurely terminated their certificates of deposit (CD's). In its 1981 federal income tax return, Centennial claimed a deduction for the difference between the face value of the mortgage interests it surrendered and the fair market value of the mortgage interests it received. It also treated the early withdrawal penalties it received as "income by reason of the discharge . . . of indebtedness" excludable from gross income under 26 USC § 108(a)(1)(C) (1982 ed) [26 USCS § 108(a)(1)(C)]. After the Internal Revenue Service disallowed the deduction of the losses associated with the mortgages and determined that Centennial was required to declare the early withdrawal penalties as income, Centennial paid the deficiencies and filed a refund action in the District Court. The court entered a judgment for petitioner United States on the mortgage-exchange issue and for Centennial on the early withdrawal penalty issue. The Court of Appeals reversed the mortgage-exchange ruling, but affirmed the early withdrawal penalty holding.

Held:

1. Centennial realized tax-deductible losses when it exchanged mortgage interests with the other lender. Cottage Savings Assn. v Commissioner, ante, p 578-579, 113 L Ed 2d 589, 111 S Ct 1503.

2. The early withdrawal penalties collected by Centennial were not excludable from income under § 108(a)(1). A debtor realizes income from the "discharge of indebtedness" only when the income results from the forgiveness of, or release from, an obligation to repay assumed by the debtor at the outset of the debtor-creditor relationship. Here, the depositors who prematurely closed

their accounts and incurred penalties did not forgive or release any repayment obligation on the part of Centennial, which paid exactly what it was obligated to pay according to the terms of the agreements entered into at the time the CD's were established. This reading best comports with § 108's purpose, which is to mitigate the effect of treating a discharge of indebtedness as income so that the prospect of immediate tax liability will not discourage businesses from taking advantage of opportunities to repurchase or liquidate their debts at less than face value. A debtor who negotiates in advance the circumstances in which he will liquidate the debt is in a position to anticipate his need for cash with which to pay the resulting income tax and can negotiate the terms of the anticipated liquidation accordingly. Moreover, in this case, Centennial was committed to releasing the deposits at the sole election of the depositors. Thus, unlike a debtor considering the negotiation of an adjustment of the terms of a duty to repay, Centennial had no discretion to take the tax effects of a transaction into account before liquidating its obligation at less than face value.

887 F2d 595, affirmed in part, reversed in part, and remanded.

Marshall, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Stevens, O'Connor, Scalia, Kennedy, and Souter, JJ., joined, in Parts I and III of which White, J., joined, and in Part III of which Blackmun, J., joined. Blackmun, J., filed an opinion concurring in part and dissenting in part, in which White, J., joined.

APPEARANCES OF COUNSEL

John G. Roberts, Jr. argued the cause for petitioner.
Michael F. Duhl argued the cause for respondent.
Briefs of Counsel, p 820, infra.

OPINION OF THE COURT

[499 US 575]

Justice **Marshall** delivered the opinion of the Court.*

[1a, 2a] In this case, we consider two questions relating to the federal income tax liability of respondent Centennial Savings Bank FSB (Centennial). The first is whether Centennial realized deductible losses when it exchanged its interests in one group of residential mortgage loans for another lender's interests in a different group of residential mortgage loans. The second is whether penalties collected by Centennial for the premature withdrawal of federally insured certificates of deposit (CD's) constituted "income by reason of the discharge . . . of indebtedness" excludable from gross income under 26 USC § 108(a)(1)(C) (1982 ed) [26 USCS § 108(a)(1)(C)]. The Court of Appeals answered both questions affirmatively. We agree with the Court of Appeals that Centennial's mortgage exchange gave rise to an immediately deductible loss, but we reverse the Court of Appeals' determination that Centennial was entitled to exclude from its taxable income the early withdrawal penalties collected from its depositors.

I

Centennial is a mutual savings

* Justice **White** joins Parts I and III of this opinion, and Justice **Blackmun** joins Part III.

and loan institution (S & L) formerly regulated by the Federal Home Loan Bank Board (FHLBB).[1] At issue in this case are two sets of transactions involving Centennial in the 1981 tax year.

[1b] The first was Centennial's exchange of "90% participation interests" in a set of mortgage loans held by Centennial for "90% participation interests" in a different set of mortgage loans held by the Federal National Mortgage Association (FNMA).[2] Secured by residential properties located primarily

[499 US 576]

in northern Texas, Centennial's 420 loans had a face value of approximately $8.5 million and a fair market value of approximately $5.7 million; FNMA's 377 loans, secured by properties located throughout Texas, likewise had a face value of approximately $8.5 million and a fair market value of $5.7 million. Centennial and FNMA structured the exchange so that the respective mortgage packages would be deemed "substantially identical" under the FHLBB's Memorandum R-49, dated June 27, 1980, a regulatory directive aimed at identifying mortgage exchanges that would not generate accounting losses for FHLBB regulatory purposes but that would generate deductible losses for federal tax purposes. See generally Cottage Savings Assn. v Commissioner, ante, at 556-557, 113 L Ed 2d, at 589, 111 S Ct 1503. On its 1981 return, Centennial claimed a deduction for the loss of $2,819,218, the difference between the face value (and cost basis) of the mortgage interests surrendered to FNMA and the market value of the mortgage interests received from FNMA in return.

The second set of transactions was Centennial's collection of early withdrawal penalties from customers who prematurely terminated their CD accounts. Each CD agreement established a fixed-term, fixed-interest account. See App 27-29. Consistent with federal regulations, each agreement also provided that the depositor would be required to pay a penalty to Centennial should the depositor withdraw the principal before maturity. See 12 CFR § 526.7(a) (1979); 12 CFR § 526.7(a) (1980); 12 CFR § 1204.103 (1981). Thus, in the event of premature withdrawal, the depositor was entitled under the CD agreement to the principal and accrued interest, minus the applicable penalty. See App 27-29.

Centennial collected $258,019 in early withdrawal penalties in 1981. In its tax return for that year, Centennial treated the penalties as income from the discharge of indebtedness. Pursuant to 26 USC §§ 108 and 1017 (1982 ed) [26 USCS §§ 108 and 1017], Centennial excluded the $258,019 from its income and reduced the basis of its depreciable property by that amount.

[499 US 577]

On audit, the Internal Revenue Service disallowed the deduction of the losses associated with Centennial's mortgages, and determined that Centennial should have declared as income the early withdrawal penalties collected that year. After paying the resulting deficiencies, Centennial

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1. While this case was pending on appeal, the FHLBB found Centennial to be insolvent. Centennial is currently under the receivership of the Resolution Trust Corporation.

2. **[1c]** By exchanging merely participation interests, each party retained its relationships with the obligors of the exchanged loans. See Cottage Savings Assn. v Commissioner, ante, at 557-558, n 3, 113 L Ed 2d 589, 111 S Ct 1503.

instituted this refund action in the District Court for the Northern District of Texas, which entered judgment for the United States on the mortgage-exchange issue, and for Centennial on the early withdrawal penalty issue. 682 F Supp 1389 (1988).

The Court of Appeals for the Fifth Circuit reversed in part and affirmed in part. 887 F2d 595 (1989). It reversed the District Court's ruling that Centennial did not realize a deductible loss in the mortgage-exchange transaction. Relying on its reasoning in another decision handed down the same day, see San Antonio Savings Assn. v Commissioner, 887 F2d 577 (1989), the Court of Appeals concluded that although the respective mortgage packages exchanged by Centennial and FNMA were "substantially identical" under Memorandum R-49, the two sets of mortgages were nonetheless "materially different" for tax purposes because they were secured by different residential properties. See 887 F2d, at 600. Consequently, the court held, the exchange of the two sets of mortgages did give rise to a realization event for tax purposes, allowing Centennial immediately to recognize its losses. See ibid.

The Court of Appeals affirmed the District Court's conclusion that Centennial was entitled to treat the early withdrawal penalties as income from the discharge of indebtedness under § 108. The court reasoned that "the characterization of income as income from the discharge of indebtedness depends purely on the spread between the amount received by the debtor and the amount paid by him to satisfy his obligation." Id., at 601. Under this test, the early withdrawal penalties constituted income from the discharge of indebtedness, the court concluded, because the penalties reduced the size of Centennial's obligation to its depositors. See id.,

[499 US 578]

at 601-602. The court rejected the United States' characterization of the penalties as merely a "medium of payment" for Centennial's performance of its "separate obligation" to release the deposits prior to maturity. Id., at 604-605.

The United States thereafter petitioned this Court for a writ of certiorari. Because the Court of Appeals' dispositions of both the mortgage-exchange issue and the early withdrawal penalty issue are in conflict with decisions in other Circuits, and because of the importance of both issues for the savings and loan industry, we granted the petition. 498 US 808, 112 L Ed 2d 17, 111 S Ct 40 (1990).[3]

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3. The Fifth Circuit's conclusion that an exchange of mortgages that are "substantially identical" under Memorandum R-49 can give rise to realizable tax losses is in conflict with a decision of the Sixth Circuit. See Cottage Savings Assn. v Commissioner, 890 F2d 848 (1989), rev'd and remanded, ante, p 554, 113 L Ed 2d 589, 111 S Ct 1503. The Fifth Circuit's conclusion that early withdrawal penalties constitute discharge-from-indebtedness income under the pre-1986 version of § 108 is in conflict with a decision of the Seventh Circuit. See Colonial Savings Assn. v Commissioner, 854 F2d 1001 (1988), cert denied, 489 US 1090, 103 L Ed 2d 859, 109 S Ct 1556 (1989). In 1986, Congress amended § 108, limiting its application to situations in which the taxpayer is insolvent or in bankruptcy at the time of the discharge of his indebtedness. See Pub L 99-514, § 822(a), 100 Stat 2373; see also Pub L 100-647, § 1004(a)(1), 102 Stat 3385 (1988) (extending § 108 to "qualified farm indebtedness"). We granted certiorari nonetheless in light of the significant number of pending cases concerning the tax status of early withdrawal penalties collected prior to 1986.

II

[1d] The question whether Centennial realized tax-deductible losses when it exchanged mortgage interests with FNMA is controlled by our decision in Cottage Savings Assn. v Commissioner. In Cottage Savings, we recognized that a property exchange gives rise to a realization event for purposes of § 1001(a) of the Internal Revenue Code[4] so long as the exchanged

[499 US 579]

properties are "materially different." Ante, at 560-562, 113 L Ed 2d, at 589, 111 S Ct 1503. We concluded that the properties are "different" in the sense "material" to the Code so long as they embody legally distinct entitlements. Ante, at 564-565, 113 L Ed 2d, at 589, 111 S Ct 1503.

That test is easily satisfied here. As in Cottage Savings, the participation interests exchanged here were in loans made to different obligors and secured by different properties. Thus, the interests embodied distinct entitlements. We therefore affirm the Court of Appeals' conclusion that Centennial was entitled to a refund of the disallowed losses claimed on its mortgages.

III

[2b] We next consider the question whether the early withdrawal penalties collected by Centennial constituted "income by reason of the discharge . . . of indebtedness" excludable from income under 26 USC § 108(a)(1) (1982 ed) [26 USCS § 108(a)(1)]. We conclude that the penalties were not subject to exclusion under § 108 because the depositors who paid these penalties did not "discharge" Centennial from any repayment obligation.

The version of § 108 in effect for the 1981 tax year states:

> "Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) of indebtedness of the taxpayer if—
>
> . . . . .
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> "(C) the indebtedness discharged is qualified business indebtedness." 26 USC § 108(a)(1) (1982 ed) [26 USCS § 108(a)(1)].

"[Q]ualified business indebtedness" includes "indebtedness . . . incurred or assumed . . . by a corporation." 26 USC § 108(d)(4)(A) (1982 ed) [26 USCS § 108(d)(4)(A)].[5] Income from the discharge of

[499 US 580]

qualified business indebtedness can be excluded from gross income under § 108 only if the taxpayer elects to reduce the basis of his depreciable property by an amount equal to the income excluded. 26 USC §§ 108(c)(1), 108(d)(4)(B), 1017 (1982 ed) [26 USCS §§ 108(c)(1), 108(d)(4)(B), 1017]. Thus, the effect of § 108 is not genuinely to exempt such income from taxation, but rather to defer the payment of the tax by reducing the taxpayer's annual depreciation deductions or by increasing the size of taxable gains upon ultimate disposition of the reduced-basis property.

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4. "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized." 26 USC § 1001(a) [26 USCS § 1001(a)].

5. It also includes "indebtedness . . . incurred or assumed . . . by an individual in connection with property used in his trade or business." 26 USC § 108(d)(4)(A) (1982 ed) [26 USCS § 108(d)(4)(A)].

In characterizing early withdrawal penalties as discharge-of-indebtedness income, Centennial, like the Court of Appeals, focuses purely on the "spread" between the debt that Centennial assumed upon the opening of each CD account and the amount that it actually paid each depositor upon the closing of the account. See 887 F2d, at 601. When a depositor opens a CD account, Centennial notes, the bank becomes indebted to the depositor for the principal of the deposit plus accrued interest. By virtue of its collection of an early withdrawal penalty, however, the bank satisfies the debt for *less* than that amount should the depositor withdraw the principal before maturity. The end result, in Centennial's view, is no different from what it would have been had the bank and depositor (freed from the restraints of bank regulatory law) formed no agreement on an early withdrawal penalty at the outset but rather negotiated a forgiveness of that amount at the time of withdrawal.

[2c] We reject this analysis because it fails to make sense of § 108's use of the term "discharge." As used in § 108, the term "discharge . . . of indebtedness" conveys *forgiveness of,* or *release from,* an obligation to repay.[6] A depositor who

[499 US 581]

prematurely closes his account and pays the early withdrawal penalty does not forgive or release any repayment obligation on the part of the financial institution. The CD agreement itself provides that the depositor will be entitled only to the principal and accrued interest, less the applicable penalty, should the depositor prematurely withdraw the principal. Through this formula, the depositor and the bank have determined in advance precisely how much the depositor will be entitled to receive should the depositor close the account on any day up to the maturity date. Thus, the depositor does not "discharge" the bank from an obligation when it accepts an amount equal to the principal and accrued interest minus the penalty, for this is exactly what the bank is obligated to pay under the terms of the CD agreement.

[2e, 3, 4, 5a, 6a] Because § 108 presupposes the "discharge" of an obligation to repay, we disagree with Centennial and the Court of Appeals' conclusion that the "spread" between the debt assumed by Centennial and the amount paid by Centennial upon the closing of the account is sufficient to trigger § 108. The existence of such a spread is sufficient to demonstrate that Centennial enjoyed an accession to income equal in size to the amount of the penalty. But because this income was not the product of the release of any obligation assumed by Centennial at the outset of the bank-depositor relationship, it does not constitute income "by reason of [a] discharge." In sum, to determine whether the debtor has realized "income by reason of the discharge . . . of indebtedness," it is necessary to look at *both* the end result of the

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6. **[2d]** "Discharge" can be used to signify various means of extinguishing a legal duty. See generally Black's Law Dictionary 463 (6th ed 1990). Thus, a debtor might be said to "discharge" his debt by satisfying it. But § 108 uses "income by reason of the discharge . . . of indebtedness" to refer to the change in the debtor's financial condition when the debtor is no longer legally required to satisfy his debt either in part or in full. "Discharge" in this sense can occur only if the creditor cancels or forgives a repayment obligation.

transaction *and* the repayment terms agreed to by the parties at the outset of the debtor-creditor relationship.[7]

[499 US 582]

[2f, 7] This common-sense reading of the statutory language best comports with the purpose underlying § 108. The tax-deferral mechanism in § 108 is designed to mitigate the effect of treating the discharge of indebtedness as *income*. See 26 USC § 61(a)(12) (1982 ed) [26 USCS § 61(a)(12)] ("gross income . . . includ[es] . . . [i]ncome from discharge of indebtedness"). Borrowed funds are excluded from income in the first instance because the taxpayer's obligation to repay the funds offsets any increase in the taxpayer's assets; if the taxpayer is thereafter released from his obligation to repay, the taxpayer enjoys a net increase in assets equal to the forgiven portion of the debt, and the basis for the original exclusion thus evaporates. See United States v Kirby Lumber Co. 284 US 1, 3, 76 L Ed 131, 52 S Ct 4 (1931); Commissioner v Jacobson, 336 US 28, 38, 93 L Ed 477, 69 S Ct 358 (1949); see also Commissioner v Tufts, 461 US 300, 307, 310-311, n 11, 75 L Ed 2d 863, 103 S Ct 1826 (1983). But while the cancellation of the obligation to repay increases the taxpayer's assets, it does not necessarily generate cash with which the taxpayer can pay the resulting income tax. Congress established the tax-deferral mechanism

[499 US 583]

in § 108 so so that the prospect of immediate tax liability would not discourage businesses from taking advantage of opportunities to repurchase or liquidate their debts at less than face value. See HR Rep No. 855, 76th Cong, 1st Sess, 5 (1939); S Rep No. 1631, 77th Cong, 2d Sess, 77-78 (1942). See generally Wright, Realization of Income Through Cancellations, Modifications, and Bargain Purchases of Indebtedness: I, 49 Mich L Rev 459, 477, 492 (1951).

[2g] This rationale is squarely implicated only when the debtor is seeking forgiveness or cancellation of a pre-existing repayment obligation. A debtor who negotiates in advance the circumstances in which he will liquidate the debt for less than its face value is in a position to anticipate his need for cash with which to pay the resulting income tax and can negotiate the terms of

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7. **[5b, 6b]** Renewing the argument that it unsuccessfully advanced in the Court of Appeals, the United States characterizes the penalties not as income by reason of the discharge of indebtedness, but rather as income for Centennial's performance of a "separate obligation." This argument draws on authorities recognizing that § 108 does not apply when a creditor discharges a debtor's obligation in exchange for services or some other form of nonmonetary consideration. See Spartan Petroleum Co. v United States, 437 F Supp 733 (SC 1977) (debt discharged in exchange for cancellation of distributorship agreement); OKC Corp. v Commissioner, 82 TC 638, 649-650 (1984) (debt discharged in exchange for settlement of lawsuit). In that situation, the debt is not forgiven but is in fact satisfied in full through the debtor's performance of a "separate obligation"; discharge of the debt is merely the "medium of payment" for that performance, and must be treated as ordinary income for tax purposes. See S Rep No. 96-1035, p 8, n 6 (1980) ("Debt discharge that is only a medium for some other form of payment, such as a gift or salary, is treated as that form of payment rather than under the debt discharge rules"). See generally 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 6.4.7, p 6-66 (2d ed 1989). Because we conclude that Centennial's reliance on § 108 fails for a more fundamental reason—the absence of a "discharge" for purposes of the statute—we need not consider whether the early withdrawal penalties were actually payments for services unrelated to the debtor-creditor relationship.

the anticipated liquidation accordingly. Moreover, insofar as the CD agreements at issue in this case committed Centennial to releasing the deposits at the sole election of the depositors, Centennial abandoned any control whatsoever over whether and when these particular debt obligations would be liquidated. Consequently, unlike a debtor considering the negotiation of an adjustment of the terms of his duty to repay, Centennial had no discretion to take the tax effects of the transaction into account before liquidating its debt obligations at less than face value.

It is true, as Centennial points out, that construing § 108 to apply only to debt reductions stemming from a negotiated forgiveness of a duty to repay withholds a tax incentive to include "anticipatory discharge" terms in the credit agreement at the outset. But we read the statutory language as embodying a legislative choice not to extend the benefits of § 108's deferral mechanism that far. For the reasons that we have stated, Congress could easily have concluded that only debtors seeking a release from a pre-existing repayment obligation need or deserve the tax break conferred by § 108. Consistent with the rule that tax-exemption and -deferral provisions are to be construed narrowly, Commissioner v

[499 US 584]

Jacobson, supra, at 49, 93 L Ed 477, 69 S Ct 358; Elam v Commissioner, 477 F2d 1333, 1335 (CA6 1973), we conclude that Congress did not intend to extend the benefits of § 108 beyond the setting in which a creditor agrees to release a debtor from an obligation assumed at the outset of the relationship.

IV

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice **Blackmun,** joined by Justice **White,** concurred in part and dissented in part in an opinion appearing in Cottage Savings Association v Commissioner of Internal Revenue (No. 89-1965), 113 L Ed 2d, at page 605, supra.

[499 US 585]

CARNIVAL CRUISE LINES, INC., Petitioner

v

EULALA SHUTE, et vir

499 US 585, 113 L Ed 2d 622, 111 S Ct 1522

[No. 89-1647]

Argued January 15, 1991. Decided April 17, 1991.

Decision: Forum-selection clause in cruise tickets held enforceable in ticketholders' personal-injury action, despite lack of bargaining over clause and alleged inconvenience to ticketholders.

SUMMARY

A husband and wife residing in the state of Washington purchased passage for a cruise between Los Angeles, California and Puerto Vallarta, Mexico on a ship operated by a Panamanian corporation which had its principal place of business in Miami, Florida. The "passage contract tickets" received by the couple contained a clause designating courts located in the state of Florida as the agreed-upon exclusive venue for litigating any disputes arising under the contract between passenger and carrier. While the cruise ship was in international waters off the coast of Mexico, the wife fell and was injured; and the couple, claiming that the wife's injuries had been caused by the negligence of the cruise line and its employees, subsequently filed suit against the corporation in the United States District Court for the Western District of Washington. The District Court granted the corporation's motion for summary judgment, on the ground that the corporation's contacts with the state of Washington were insufficient to support the District Court's exercise of personal jurisdiction over the corporation. However, the United States Court of Appeals for the Ninth Circuit eventually reversed and remanded, as it held that (1) the corporation had sufficient contacts with the state to support personal jurisdiction; and (2) it would be unreasonable to apply the forum-selection clause of the ticket contract in the case at hand, because (a) the clause was not freely bargained for, and (b) as an independent rationale, there was evidence in the record to indicate that the couple were physically and financially incapable of pursuing the litigation in Florida (897 F2d 377).

SUBJECT OF ANNOTATION

Beginning on page 823, infra

Validity, under federal law, of contractual provision limiting place or court in which action may be brought—Supreme Court cases

Briefs of Counsel, p 821, infra.

On certiorari, the United States Supreme Court reversed. In an opinion by BLACKMUN, J., joined by REHNQUIST, Ch. J., and WHITE, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., it was held that the forum-selection clause was enforceable in the case at hand, because (1) including a reasonable, nonnegotiated forum-selection clause in a form ticket contract may be permissible; (2) the couple had not satisfied the heavy burden of proof required to set the clause aside on grounds of inconvenience, given that (a) Florida is not a remote alien forum, (b) in view of the location of the accident, this was not an essentially local dispute inherently more suited to resolution in the state of Washington than in Florida, and (c) the couple did not claim lack of notice of the forum clause; (3) although forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness, (a) there was no indication that the corporation had set Florida as the forum as a means of discouraging legitimate claims by passengers, (b) there was no evidence that the couple's accession to the forum clause was obtained through fraud or overreaching, and (c) the couple concededly had received notice of the forum clause and therefore presumably had the option of rejecting the contract with impunity; and (4) 46 USCS Appx § 183c—which prohibits the owners of passenger vessels from inserting in contracts any provision that would "lessen, weaken, or avoid" a claimant's right to trial "by a court of competent jurisdiction"—was not violated by the clause at issue, as a court located in Florida is a "court of competent jurisdiction" within the meaning of the statute.

STEVENS, J., joined by MARSHALL, J., dissented, expressing the view that (1) the forum-selection clause was unreasonable, because only the most meticulous passengers would be likely to become aware of it in the fine print on their tickets, and many would have that opportunity only after they had purchased the tickets, at which point another clause of the contract would bar any refund; (2) under prevailing admiralty rules, forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy; and (3) the forum-selection clause in question lessened or weakened the couple's ability to recover for the accident within the prohibition of § 183c, because it was safe to assume that any witnesses could be assembled with less expense and inconvenience at a west coast forum than thousands of miles away in Florida.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Contracts § 101; Evidence § 952 — forum-selection clause — inconvenience — sufficiency

1a-1d. A forum-selection clause in a cruise line's passage contract tickets—which clause provides that any disputes arising under the contract must be litigated, if at all, in courts located in the state of Florida—may be enforced to bar an action brought in a Federal District Court in the state of Washington by a husband and wife who, having purchased such tickets for and having taken a

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17A Am Jur 2d, Contracts § 266; 20 Am Jur 2d, Courts § 141; 70 Am Jur 2d, Shipping §§ 660, 661, 674-681; 77 Am Jur 2d, Venue § 7

1 Federal Procedure, L Ed, Access to District Courts § 1:629

12B Federal Procedural Forms, L Ed, Maritime Law and Procedure § 47:191

22 Am Jur Pl & Pr Forms (Rev), Shipping, Form 1

16A Am Jur Legal Forms 2d (Rev), Ships and Shipping §§ 233:141-233:146

46 USCS Appx § 183c

L Ed Digest, Contracts § 101

L Ed Index, Admiralty; Forum Selection Clause; Tickets; Type Size; Venue

Index to Annotations, Admiralty; Contracts; Ships and Vessels; Tickets; Venue

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Comment Note.—Admiralty jurisdiction in matters of contract. 29 ALR Fed 325.

Federal view as to effect of conditions appearing on back or margin of passenger's ticket for ocean voyage. 5 ALR Fed 394.

Validity or enforceability, under Carriage of Goods by Sea Act (46 USCS §§ 1300 et seq.) of clauses in bill of lading or shipping contract as to jurisdiction of foreign courts or applicability of foreign law. 2 ALR Fed 963.

Validity of contractual provision limiting place or court in which action may be brought. 31 ALR4th 404.

cruise between California and Mexico, alleged that the wife had been injured due to the negligence of the cruise line and its employees while the ship was in international waters off the coast of Mexico, because (1) including a reasonable forum-selection clause in a form ticket contract may be permissible, even though the clause was not the subject of bargaining, given that (a) a cruise line, which typically carries passengers from many locales, has a special interest in limiting the fora in which the line could be subject to suit, (b) such a clause has the salutary effect of dispelling any confusion about where suits arising under the contract must be brought and defended, thus sparing litigants and courts the time and expense of litigating those issues, and (c) cruise line passengers benefit in the form of reduced fares reflecting the savings which the line enjoys by limiting the fora where it may be sued; (2) the couple has not satisfied the heavy burden of proof required to set the clause aside on grounds of inconvenience, given that (a) Florida is not a remote alien forum, (b) in view of the location of the accident, this was not an essentially local dispute inherently more suited to resolution in the state of Washington than in Florida, and (c) the couple did not claim lack of notice of the forum clause; (3) although forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness, (a) there was no indication that the cruise line, a Panamanian corporation which had its principal place of business in Florida and which ran many cruises using Florida ports, had set Florida as the forum as a means of discouraging legitimate claims by passengers, (b) there was no evidence that the couple's accession to the forum clause had been obtained through fraud or overreaching, and (c) the couple had concededly received notice of the forum clause and therefore presumably had the option of rejecting the contract with impunity; and (4) 46 USCS Appx § 183c—which prohibits the owners of passenger vessels from inserting in contracts any provision that would "lessen, weaken, or avoid" a claimant's right to trial "by a court of competent jurisdiction"—is not violated by the clause at issue, as a court located in Florida is a "court of competent jurisdiction" within the meaning of the statute. (Stevens and Marshall, JJ., dissented from this holding.)

[See annotation p 823, infra]

Appeal § 1662 — effect of decision on other grounds

2. Because the United States Supreme Court—in considering on certiorari whether former passengers on a cruise could bring a personal-injury action against the cruise line in a Federal District Court in the state of Washington, despite a ticket-contract clause requiring that any disputes arising under the contract be litigated in courts located in the state of Florida—finds the forum-selection clause to be enforceable and dispositive of the question, the Supreme Court need not consider the cruise line's constitutional argument as to whether the line had sufficient contacts with the state of Washington to support the District Court's exercise of personal jurisdiction.

Admiralty §§ 56, 76 — injury to passenger — governing law

3. A case in which a husband and wife who had purchased tickets for a cruise sue the cruise line to recover damages for injuries allegedly suf-

fered by the wife when she slipped and fell on board while the ship was in international waters off the coast of Mexico, is a case in admiralty, and federal law governs the enforceability of a forum-selection clause in the cruise line's tickets, which clause requires that any disputes arising under the ticket contract be litigated in courts located in the state of Florida.

Appeal § 1483 — review of facts — admiralty

4. The United States Supreme Court—in considering on certiorari whether a husband and wife who had taken a cruise, during which the wife allegedly had been injured due to the cruise line's negligence, could bring an admiralty action against the line in a Federal District Court in the state of Washington despite a ticket-contract clause requiring that any disputes arising under the contract be litigated in courts located in the state of Florida—will not defer to a Federal Court of Appeals' factual determination that there is evidence in the record to indicate that the couple were physically and financially incapable of pursuing this litigation in Florida, because (1) in dismissing the couple's case for lack of personal jurisdiction over the cruise line, the District Court made no finding regarding physical and financial impediments to the couple's pursuing their case in Florida, and (2) the Court of Appeals' conclusory reference to the record, in the course of a decision reversing the judgment of the District Court and remanding the case, provides no basis for the Supreme Court to validate the finding of inconvenience.

SYLLABUS BY REPORTER OF DECISIONS

After the respondents Shute, a Washington State couple, purchased passage on a ship owned by petitioner, a Florida-based cruise line, petitioner sent them tickets containing a clause designating courts in Florida as the agreed-upon fora for the resolution of disputes. The Shutes boarded the ship in Los Angeles, and, while in international waters off the Mexican coast, Mrs. Shute suffered injuries when she slipped on a deck mat. The Shutes filed suit in a Washington Federal District Court, which granted summary judgment for petitioner. The Court of Appeals reversed, holding, inter alia, that the forum-selection clause should not be enforced under The Bremen v Zapata Off-Shore Co. 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907, because it was not "freely bargained for," and because its enforcement would operate to deprive the Shutes of their day in court in light of evidence indicating that they were physically and financially incapable of pursuing the litigation in Florida.

Held: The Court of Appeals erred in refusing to enforce the forum-selection clause.

(a) The Bremen Court's statement that a freely negotiated forum-selection clause, such as the one there at issue, should be given full effect, 407 US, at 12-13, 32 L Ed 2d 513, 92 S Ct 1907, does not support the Court of Appeals' determination that a nonnegotiated forum clause in a passage contract is never enforceable simply because it is not the subject of bargaining. Whereas it was entirely reasonable for The Bremen Court to have expected the parties to have negotiated with care in selecting a

forum for the resolution of disputes arising from their complicated international agreement, it would be entirely unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form. Nevertheless, including a reasonable forum clause in such a form contract well may be permissible for several reasons. Because it is not unlikely that a mishap in a cruise could subject a cruise line to litigation in several different fora, the line has a special interest in limiting such fora. Moreover, a clause establishing ex ante the dispute resolution forum has the salutary effect of dispelling confusion as to where suits may be brought and defended, thereby sparing litigants time and expense and conserving judicial resources. Furthermore, it is likely that passengers purchasing tickets containing a forum clause like the one here at issue benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.

(b) The Court of Appeals' conclusion that the clause here at issue should not be enforced because the Shutes are incapable of pursuing this litigation in Florida is not justified by The Bremen Court's statement that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." Id., at 17, 32 L Ed 2d 513, 92 S Ct 1907. That statement was made in the context of a hypothetical "agreement between two Americans to resolve their essentially local disputes in a remote alien forum." Ibid. Here, in contrast, Florida is not such a forum, nor—given the location of Mrs. Shute's accident—is this dispute an essentially local one inherently more suited to resolution in Washington than in Florida. In light of these distinctions, and because the Shutes do not claim lack of notice of the forum clause, they have not satisfied the "heavy burden of proof," ibid., required to set aside the clause on grounds of inconvenience.

(c) Although forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness, there is no indication that petitioner selected Florida to discourage cruise passengers from pursuing legitimate claims or obtained the Shutes' accession to the forum clause by fraud or overreaching.

(d) By its plain language, the forum-selection clause at issue does not violate 46 USC App § 183c [46 USCS Appx § 183c], which, inter alia, prohibits a vessel owner from inserting in any contract a provision depriving a claimant of a trial "by court of competent jurisdiction" for loss of life or personal injury resulting from negligence.

897 F2d 377, reversed.

Blackmun, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, O'Connor, Scalia, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined.

APPEARANCES OF COUNSEL

Richard K. Willard argued the cause for petitioner.
Gregory J. Wall argued the cause for respondents.
Briefs of Counsel, p 821, infra.

OPINION OF THE COURT

[499 US 587]

Justice **Blackmun** delivered the opinion of the Court.

[1a] In this admiralty case we primarily consider whether the United States Court of Appeals for the Ninth Circuit correctly refused to enforce a forum-selection clause contained in tickets issued by petitioner Carnival Cruise Lines, Inc., to respondents Eulala and Russel Shute.

I

The Shutes, through an Arlington, Wash., travel agent, purchased passage for a 7-day cruise on petitioner's ship, the Tropicale. Respondents paid the fare to the agent who forwarded the payment to petitioner's headquarters in Miami, Fla. Petitioner then prepared the tickets and sent them to respondents in the State of Washington. The face of each ticket, at its left-hand lower corner, contained this admonition:

"SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES **IMPORTANT!** PLEASE READ CONTRACT —ON LAST PAGES 1, 2, 3" App 15.

The following appeared on "contract page 1" of each ticket:

"*TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET*

. . . . .

"3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

. . . . .

"8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract

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shall be litigated, if at all, in and before a Court located in the State of Florida, USA, to the exclusion of the Courts of any other state or country." Id., at 16.

The last quoted paragraph is the forum-selection clause at issue.

II

Respondents boarded the Tropicale in Los Angeles, Cal. The ship sailed to Puerto Vallarta, Mexico, and then returned to Los Angeles. While the ship was in international waters off the Mexican coast, respondent Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley. Respondents filed suit against petitioner in the United States District Court for the Western District of Washington, claiming that Mrs. Shute's injuries had been caused by the negligence of Carnival Cruise Lines and its employees. Id., at 4.

Petitioner moved for summary judgment, contending that the forum clause in respondents' tickets required the Shutes to bring their suit against petitioner in a court in the State of Florida. Petitioner contended, alternatively, that the District Court lacked personal jurisdiction over petitioner because petitioner's contacts with the State of Washington were insubstantial. The District Court granted the motion, holding that petitioner's contacts with Washington were constitutionally insufficient to support the exercise of personal jurisdiction. See App to Pet for Cert 60a.

The Court of Appeals reversed. Reasoning that "but for" petitioner's solicitation of business in Washington, respondents would not have taken the cruise and Mrs. Shute would not have been injured, the court concluded that petitioner had sufficient contacts with Washington to justify the District Court's exercise of personal jurisdiction. 897 F2d 377, 385-386 (CA9 1990).*

[499 US 589]

Turning to the forum-selection clause, the Court of Appeals acknowledged that a court concerned with the enforceability of such a clause must begin its analysis with The Bremen v Zapata Off-Shore Co. 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907 (1972), where this Court held that forum-selection clauses, although not "historically . . . favored," are "prima facie valid." Id., at 9-10, 32 L Ed 2d 513, 92 S Ct 1907. See 897 F2d, at 388. The appellate court concluded that the forum clause should not be enforced because it "was not freely bargained for." Id., at 389. As an "independent justification" for refusing to enforce the clause, the Court of Appeals noted that there was evidence in the record to indicate that "the Shutes are physically and financially incapable of pursuing this litigation in Florida" and that the enforcement of the clause would operate to deprive them of their day in court and thereby contravene this Court's holding in The Bremen. 897 F2d, at 389.

[2] We granted certiorari to address the question whether the Court of Appeals was correct in holding that the District Court should hear respondents' tort claim against petitioner. 498 US 807-808, 112 L Ed 2d 16, 111 S Ct 39 (1990). Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction. See Ashwander v TVA, 297 US 288, 347, 80 L Ed 688, 56 S Ct 466 (1936) (Brandeis, J., concurring) (" 'It is not the habit of the Court to decide questions of a constitutional nature unless

[499 US 590]

absolutely necessary to a decision of the case,' " quoting Burton v United States, 196 US 283, 295, 49 L Ed 482, 25 S Ct 243 (1905)).

III

[3] We begin by noting the boundaries of our inquiry. First, this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize. See Archawski v Hanioti, 350 US 532, 533, 100 L Ed 676, 76 S Ct 617 (1956); The Moses Taylor, 4 Wall 411, 427, 18 L Ed 397 (1867); Tr of Oral Arg 36-37, 12, 47-48. Cf. Stewart Organization, Inc. v Ricoh Corp. 487 US 22, 28-29, 101 L Ed 2d 22,

* The Court of Appeals had filed an earlier opinion also reversing the District Court and ruling that the District Court had personal jurisdiction over the cruise line and that the forum-selection clause in the tickets was unreasonable and was not to be enforced. 863 F2d 1437 (CA9 1988). That opinion, however, was withdrawn when the court certified to the Supreme Court of Washington the question whether the Washington long-arm statute, Wash Rev Code § 4.28.185 (1988), conferred personal jurisdiction over Carnival Cruise Lines for the claim asserted by the Shutes. See 872 F2d 930 (1989). The Washington Supreme Court answered the certified question in the affirmative on the ground that the Shutes' claim "arose from" petitioner's advertisement in Washington and the promotion of its cruises there. 113 Wash 2d 763, 783 P2d 78 (1989). The Court of Appeals then "refiled" its opinion "as modified herein." See 897 F2d, at 380, n 1.

108 S Ct 2239 (1988). Second, we do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision. Brief for Respondents 26 ("The respondents do not contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated"). Additionally, the Court of Appeals evaluated the enforceability of the forum clause under the assumption, although "doubtful," that respondents could be deemed to have had knowledge of the clause. See 897 F2d, at 389, and n 11.

Within this context, respondents urge that the forum clause should not be enforced because, contrary to this Court's teachings in The Bremen, the clause was not the product of negotiation, and enforcement effectively would deprive respondents of their day in court. Additionally, respondents contend that the clause violates the Limitation of Vessel Owner's Liability Act, 46 USC App § 183c [46 USCS Appx § 183c]. We consider these arguments in turn.

IV

A

Both petitioner and respondents argue vigorously that the Court's opinion in The Bremen governs this case, and each side purports to find ample support for its position in that

[499 US 591]

opinion's broad-ranging language. This seeming paradox derives in large part from key factual differences between this case and The Bremen, differences that preclude an automatic and simple application of The Bremen's general principles to the facts here.

In The Bremen, this Court addressed the enforceability of a forum-selection clause in a contract between two business corporations. An American corporation, Zapata, made a contract with Unterweser, a German corporation, for the towage of Zapata's oceangoing drilling rig from Louisiana to a point in the Adriatic Sea off the coast of Italy. The agreement provided that any dispute arising under the contract was to be resolved in the London Court of Justice. After a storm in the Gulf of Mexico seriously damaged the rig, Zapata ordered Unterweser's ship to tow the rig to Tampa, Fla., the nearest point of refuge. Thereafter, Zapata sued Unterweser in admiralty in federal court at Tampa. Citing the forum clause, Unterweser moved to dismiss. The District Court denied Unterweser's motion, and the Court of Appeals for the Fifth Circuit, sitting en banc on rehearing, and by a sharply divided vote, affirmed. In re Complaint of Unterweser Reederei, GmBH, 446 F2d 907 (1971).

This Court vacated and remanded, stating that, in general, "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." 407 US, at 12-13, 32 L Ed 2d 513, 92 S Ct 1907 (footnote omitted). The Court further generalized that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." Id., at 15, 32 L Ed 2d 513, 92 S Ct 1907. The Court did not define precisely the circumstances that

would make it unreasonable for a court to enforce a forum clause. Instead, the Court discussed a number of factors that made it reasonable to enforce the clause at issue in The Bremen and

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that, presumably, would be pertinent in any determination whether to enforce a similar clause.

In this respect, the Court noted that there was "strong evidence that the forum clause was a vital part of the agreement, and [that] it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." Id., at 14, 32 L Ed 2d 513, 92 S Ct 1907 (footnote omitted). Further, the Court observed that it was not "dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum," and that in such a case, "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." Id., at 17, 32 L Ed 2d 513, 92 S Ct 1907. The Court stated that even where the forum clause establishes a remote forum for resolution of conflicts, "the party claiming [unfairness] should bear a heavy burden of proof." Ibid.

In applying The Bremen, the Court of Appeals in the present litigation took note of the foregoing "reasonableness" factors and rather automatically decided that the forum-selection clause was unenforceable because, unlike the parties in The Bremen, respondents are not business persons and did not negotiate the terms of the clause with petitioner. Alternatively, the Court of Appeals ruled that the clause should not be enforced because enforcement effectively would deprive respondents of an opportunity to litigate their claim against petitioner.

The Bremen concerned a "far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea." Id., at 13, 32 L Ed 2d 513, 92 S Ct 1907. These facts suggest that, even apart from the evidence of negotiation regarding the forum clause, it was entirely reasonable for the Court in The

[499 US 593]

Bremen to have expected Unterweser and Zapata to have negotiated with care in selecting a forum for the resolution of disputes arising from their special towing contract.

[1b] In contrast, respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. See, e.g., Hodes v S. N. C. Achille Lauro ed Altri-Gestione, 858 F2d 905, 910 (CA3 1988), cert dism'd, 490 US 1001, 104 L Ed 2d 149, 109 S Ct 1633 (1989). In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise

line. But by ignoring the crucial differences in the business contexts in which the respective contracts were executed, the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in The Bremen.

In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of The Bremen to account for the realities of form passage contracts. As an initial matter, we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. See The Bremen, 407 US, at 13 and n 15, 32 L Ed 2d 513, 92 S Ct 1907; Hodes, 858 F2d, at 913. Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary

[499 US 594]

effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. See Stewart Organization, 487 US, at 33, 101 L Ed 2d 22, 108 S Ct 2239 (concurring opinion). Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued. Cf. Northwestern Nat. Ins. Co. v Donovan, 916 F2d 372, 378 (CA7 1990).

[1c, 4] We also do not accept the Court of Appeals' "independent justification" for its conclusion that The Bremen dictates that the clause should not be enforced because "[t]here is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." 897 F2d, at 389. We do not defer to the Court of Appeals' findings of fact. In dismissing the case for lack of personal jurisdiction over petitioner, the District Court made no finding regarding the physical and financial impediments to the Shutes' pursuing their case in Florida. The Court of Appeals' conclusory reference to the record provides no basis for this Court to validate the finding of inconvenience. Furthermore, the Court of Appeals did not place in proper context this Court's statement in The Bremen that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." 407 US, at 17, 32 L Ed 2d 513, 92 S Ct 1907. The Court made this statement in evaluating a hypothetical "agreement between two Americans to resolve their essentially local disputes in a remote alien forum." Ibid. In the present case, Florida is not a "remote alien forum," nor—given the fact that Mrs. Shute's accident occurred off the coast of Mexico—is this dispute an essentially local one inherently

more suited to resolution in the State of Washington than in Florida. In

[499 US 595]

light of these distinctions, and because respondents do not claim lack of notice of the forum clause, we conclude that they have not satisfied the "heavy burden of proof," ibid., required to set aside the clause on grounds of inconvenience.

It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts: Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity. In the case before us, therefore, we conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause.

B

[1d] Respondents also contend that the forum-selection clause at issue violates 46 USC App § 183c [46 USCS Appx § 183c]. That statute, enacted in 1936, see ch 521, 49 Stat 1480, provides:

> "It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent

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> jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect."

By its plain language, the forum-selection clause before us does not take away respondents' right to "a trial by [a] court of competent jurisdiction" and thereby contravene the explicit proscription of § 183c. Instead, the clause states specifically that actions arising out of the passage contract shall be brought "if at all," in a court "located in the State of Florida," which, plainly, is a "court of competent jurisdiction" within the meaning of the statute.

Respondents appear to acknowledge this by asserting that although the forum clause does not directly prevent the determination of claims against the cruise line, it causes plaintiffs unreasonable hardship in asserting their rights and therefore violates Congress' intended goal in enacting § 183c. Significantly, however, respondents cite no authority for their contention that Congress' intent in enacting § 183c was to

avoid having a plaintiff travel to a distant forum in order to litigate. The legislative history of § 183c suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that "the question of liability and the measure of damages shall be determined by arbitration." See S Rep No. 2061, 74th Cong, 2d Sess, 6 (1936); HR Rep No. 2517, 74th Cong, 2d Sess, 6 (1936). See also, Safety of Life and Property at Sea: Hearings before the House Committee on Merchant Marine and Fisheries, 74th Cong, 2d Sess, pt 4, pp 20, 36-37, 57, 109-110, 119 (1936). There was no prohibition of a forum-selection clause. Because the clause before us allows for judicial resolution of claims against petitioner and does

[499 US 597]

not purport to limit petitioner's liability for negligence, it does not violate § 183c.

V

The judgment of the Court of Appeals is reversed.

It is so ordered.

SEPARATE OPINION

Justice **Stevens,** with whom Justice **Marshall** joins, dissenting.

The Court prefaces its legal analysis with a factual statement that implies that a purchaser of a Carnival Cruise Lines passenger ticket is fully and fairly notified about the existence of the choice of forum clause in the fine print on the back of the ticket. See ante, at 587-588, 113 L Ed 2d, at 628. Even if this implication were accurate, I would disagree with the Court's analysis. But, given the Court's preface, I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs.

Of course, many passengers, like the respondents in this case, see ante, at 587, 113 L Ed 2d, at 628, will not have an opportunity to read paragraph 8 until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in paragraph 16(a), which provides that "[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger." Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling—without a refund—a planned vacation at the last minute. The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the

[499 US 598]

provision reasonable. Cf. Steven v Fidelity & Casualty Co. of New York, 58 Cal 2d 862, 883, 377 P2d 284, 298 (1962) (refusing to enforce limitation on liability in insurance policy because insured "must pur-

chase the policy before he even knows its provisions").

Even if passengers received prominent notice of the forum-selection clause before they committed the cost of the cruise, I would remain persuaded that the clause was unenforceable under traditional principles of federal admiralty law and is "null and void" under the terms of Limitation of Vessel Owners Liability Act, ch 521, 49 Stat 1480, 46 USC App § 183c [46 USCS Appx § 183c], which was enacted in 1936 to invalidate expressly stipulations limiting shipowners' liability for negligence.

Exculpatory clauses in passenger tickets have been around for a long time. These clauses are typically the product of disparate bargaining power between the carrier and the passenger, and they undermine the strong public interest in deterring negligent conduct. For these reasons, courts long before the turn of the century consistently held such clauses unenforceable under federal admiralty law. Thus, in a case involving a ticket provision purporting to limit the shipowner's liability for the negligent handling of baggage, this Court wrote:

> "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the Baltimore & Ohio &c. Railway v Voigt, 176 US 498, 505, 507 [44 L Ed 560, 20 S Ct 385], and Knott v Botany Mills, 179 US 69, 71 [45 L Ed 90, 21 S Ct 30], where the previously adjudged cases are referred to and the principles
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> [499 US 599]
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> by them expounded are restated." The Kensington, 183 US 263, 268, 46 L Ed 190, 22 S Ct 102 (1902).

Clauses limiting a carrier's liability or weakening the passenger's right to recover for the negligence of the carrier's employees come in a variety of forms. Complete exemptions from liability for negligence or limitations on the amount of the potential damage recovery,[1] requirements that notice of claims be filed within an unreasonably short period of time,[2] provisions mandating a

1. See 46 USC App § 183c [46 USCS Appx § 183c]:
"It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury . . . ."

2. See 46 USC App § 183b(a) [46 USCS Appx § 183b(a)]:
"It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred."
See also 49 USC § 11707(e) [49 USCS § 11707(e)] ("A carrier or freight forwarder

choice of law that is favorable to the defendant in negligence cases,[3] and forum-selection clauses are all similarly designed to put a thumb on the carrier's side of the scale of justice.[4]

[499 US 600]

Forum-selection clauses in passenger tickets involve the intersection of two strands of traditional contract law that qualify the general rule that courts will enforce the terms of a contract as written. Pursuant to the first strand, courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power. Some commentators have questioned whether contracts of adhesion can justifiably be enforced at all under traditional contract theory because the adhering party generally enters into them without manifesting knowing and voluntary consent to all their terms. See, e.g., Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv L Rev 1173, 1179-1180 (1983); Slawson, Mass Contracts: Lawful Fraud in California, 48 S Cal L Rev 1, 12-13 (1974); K. Llewellyn, The Common Law Tradition 370-371 (1960).

The common law, recognizing that standardized form contracts account for a significant portion of all commercial agreements, has taken a less extreme position and instead subjects terms in contracts of adhesion to scrutiny for reasonableness. Judge J. Skelly Wright set out the state of the law succinctly in Williams v Walker-Thomas Furniture Co. 121 US App DC 315, 319-320, 350 F2d 445, 449-450 (1965) (footnotes omitted):

> "Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his
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> [499 US 601]
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> consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that forcement should be withheld."

See also Steven, 58 Cal 2d, at 879-883, 377 P2d, at 295-297; Henningsen v Bloomfield Motors, Inc. 32 NJ 358, 161 A2d 69 (1960).

The second doctrinal principle implicated by forum-selection clauses is the traditional rule that "contractual provisions, which seek to limit

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may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section").

3. See, e. g., The Kensington, 183 US 263, 269, 46 L Ed 190, 22 S Ct 102 (1902) (refusing to enforce clause requiring that all disputes under contract for passage be governed by Belgian law because such law would have favored the shipowner in violation of United States public policy).

4. All these clauses will provide passengers who purchase tickets containing them with a "benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting [its exposure to liability]." See ante, at 594, 113 L Ed 2d, at 632. Under the Court's reasoning, all these clauses, including a complete waiver of liability, would be enforceable, a result at odds with longstanding jurisprudence.

the place or court in which an action may . . . be brought, are invalid as contrary to public policy." See Dougherty, Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought, 31 ALR4th 404, 409, § 3 (1984). See also Home Insurance Co. v Morse, 20 Wall 445, 451, 22 L Ed 365 (1874). Although adherence to this general rule has declined in recent years, particularly following our decision in The Bremen v Zapata Off-Shore Co. 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907 (1972), the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy. See 31 ALR4th, at 409-438 (citing cases). A forum-selection clause in a standardized passenger ticket would clearly have been unenforceable under the common law before our decision in The Bremen, see 407 US, at 9, and n 10, 32 L Ed 2d 513, 92 S Ct 1907, and, in my opinion, remains unenforceable under the prevailing rule today.

The Bremen, which the Court effectively treats as controlling this case, had nothing to say about stipulations printed on the back of passenger tickets. That case involved the enforceability of a forum-selection clause in a freely negotiated international agreement between two large corporations providing for the towage of a vessel from the Gulf of Mexico to the Adriatic Sea. The Court recognized that such towage agreements had generally been held unenforceable in American

[499 US 602]

courts,[5] but held that the doctrine of those cases did not extend to commercial arrangements between parties with equal bargaining power.

The federal statute that should control the disposition of the case before us today was enacted in 1936 when the general rule denying enforcement of forum-selection clauses was indisputably widely accepted. The principal subject of the statute concerned the limitation of shipowner liability, but as the following excerpt from the House Report explains, the section that is relevant to this case was added as a direct response to shipowners' ticketing practices.

> "During the course of the hearings on the bill (HR 9969) there was also brought to the attention of the committee a practice of providing on the reverse side of steamship tickets that in the event of damage or injury caused by the negligence or fault of the owner or his servants, the liability of the owner shall be limited to a stipulated amount, in some cases $5,000, and in others substantially lower amounts, or that in such event the question of liability and the measure of damages *shall be determined by arbitration.* The amendment to chapter 6 of title 48 of the Revised Statutes proposed to be made by section 2 of the committee amendment is intended to, and in the opinion of the committee will, *put a stop to all such practices and practices of a like*

5. "In [Carbon Black Export, Inc. v The Monrosa, 254 F2d 297 (CA5 1958), cert dism'd, 359 US 180 [3 L Ed 2d 723, 79 S Ct 710] (1959),] the Court of Appeals had held a forum-selection clause unenforceable, reiterating the traditional view of many American courts that 'agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.' 254 F2d, at 300-301." The Bremen v Zapata Off-Shore Co. 407 US 1, 6, 32 L Ed 2d 513, 92 S Ct 1907 (1972).

character." HR Rep No. 2517, 74th Cong, 2d Sess, 6-7 (1936) (emphasis added); see also S Rep No. 2061, 74th Cong, 2d Sess, 6-7 (1936).

[499 US 603]

The intent to "put a stop to all such practices and practices of a like character" was effectuated in the second clause of the statute. It reads:

> "It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) *purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor.* All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect." 46 USC App § 183c [46 USCS Appx § 183c] (emphasis added).

The stipulation in the ticket that Carnival Cruise sold to respondents certainly lessens or weakens their ability to recover for the slip and fall incident that occurred off the west coast of Mexico during the cruise that originated and terminated in Los Angeles, California. It is safe to assume that the witnesses —whether other passengers or members of the crew—can be assembled with less expense and inconvenience at a west coast forum than in a Florida court several thousand miles from the scene of the accident.

A liberal reading of the 1936 statute is supported by both its remedial purpose and by the legislative history's general condemnation of "all such practices." Although the statute does not specifically mention forum-selection clauses, its language is broad enough to encompass them. The absence of a

[499 US 604]

specific reference is adequately explained by the fact that such clauses were already unenforceable under common law and would not often have been used by carriers, which were relying on stipulations that purported to exonerate them from liability entirely. Cf. Moskal v United States, 498 US 103, 110-113, 108 L Ed 2d 607, 110 S Ct 1469 (1990).

The Courts of Appeals, construing an analogous provision of the Carriage of Goods by Sea Act, 46 USC App § 1300 et seq. [46 USCS Appx §§ 1300 et seq.], have unanimously held invalid as limitations on liability forum-selection clauses requiring suit in foreign jurisdictions. See, e.g., Hughes Drilling Fluids v M/V Luo Fu Shan, 852 F2d 840 (CA5 1988), cert denied, 489 US 1033, 103 L Ed 2d 229, 109 S Ct 1171 (1989); Union Ins. Soc. of Canton, Ltd. v S.S. Elikon, 642 F2d 721, 724-725 (CA4 1981); Indussa Corp. v S.S. Ranborg, 377 F2d 200, 203-204 (CA2 1967). Commentators have also endorsed this view. See, e. g., G. Gilmore & C. Black, The Law of Admiralty 145, and n 23 (2d ed 1975); Mendelsohn, Liberalism, Choice of Forum Clauses and the Hague Rules, 2 J of Maritime Law & Comm 661, 663-666

(1971). The forum-selection clause here does not mandate suit in a foreign jurisdiction, and therefore arguably might have less of an impact on a plaintiff's ability to recover. See Fireman's Fund American Ins. Cos. v Puerto Rican Forwarding Co. 492 F2d 1294 (CA1 1974). However, the plaintiffs in this case are not large corporations but individuals, and the added burden on them of conducting a trial at the opposite end of the country is likely proportional to the additional cost to a large corporation of conducting a trial overseas.[6]

Under these circumstances, the general prohibition against stipulations purporting "to lessen, weaken, or avoid" the passenger's right to a trial certainly should be construed to apply to the manifestly unreasonable stipulation in these passengers'

[499 US 605]

tickets. Even without the benefit of the statute, I would continue to apply the general rule that prevailed prior to our decision in The Bremen to forum-selection clauses in passenger tickets.

I respectfully dissent.

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6. The Court does not make clear whether the result in this case would also apply if the clause required Carnival passengers to sue in Panama, the country in which Carnival is incorporated.

EDITOR'S NOTE

An annotation on "Validity, under federal law, of contractual provision limiting place or court in which action may be brought—Supreme Court cases," appears p 823, infra.

CARNIVAL CRUISE LINES v SHUTE

(1991) 499 US 585, 113 L Ed 2d 622, 111 S Ct 1522

Passenger ticket

[redacted]

P. O. Box 526170, Miami, Florida 33152-6170

Passenger Booking Number

SHIP

Booking No.

Sailing

Passenger

Adult

Child

Agent

Cabin No.

S P E C I M E N

Fare

Port Charges

Total Fare

[redacted]

Passenger Ticket - To Be Presented For Passage





P. O. Box 526170, Miami, Florida 33152-6170

Passenger Booking Number

SHIP

Booking No.	Sailing	Passenger	Adult	Child
Agent	Cabin No.			

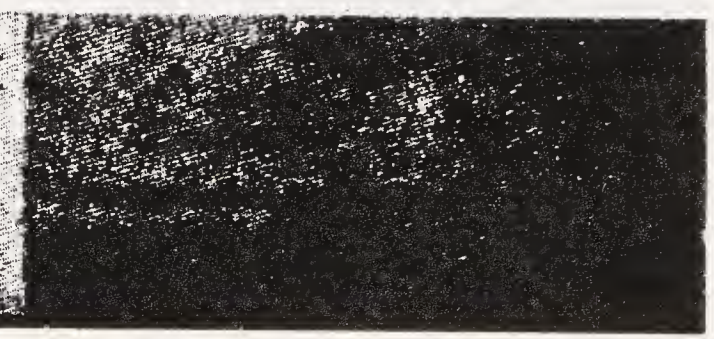
SUBJECT TO CONDITIONS OF
CONTRACT ON LAST PAGES

IMPORTANT! PLEASE READ CONTRACT
ON LAST PAGES 1, 2, 3

Fare

Port Charges

Total Fare



Passenger's Copy - Not Good For Passage

TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

1 (a) Whenever the word "Carrier" is used in this Contract it shall mean and include, jointly and severally, the Vessel, its owners, operators, charterers and tenders. The term "Passenger" shall include, the plural where appropriate, and all persons engaging to and/or traveling under this Contract The masculine includes the feminine

(b) The Master, Officers and Crew of the Vessel shall have the benefit of all of the terms and conditions of this contract

2. This ticket is valid only for the person or persons named hereon as the passenger or passengers and cannot be transferred without the Carrier's consent written hereon. Passage money shall be deemed to be earned when paid and not refundable.

3 (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

(b) The passenger admits a full understanding of the character of the Vessel and assumes all risk incident to travel and transportation and handling of passengers and cargo The Vessel may or may not carry a ship's physician at the election of the Carrier. The fare includes full board, ordinary ship's food during the voyage, but no spirits, wine, beer or mineral waters

4 The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever wheresoever arising and howsoever caused even though the same may have been caused by the negligence or default of the Carrier or its servants or agents. No undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel. This exemption from liability shall extend to the employees, servants and agents of the Carrier and for this purpose this exemption shall be deemed to constitute a Contract entered into between the passenger and the Carrier on behalf of all persons who are or become from time to time its employees, servants or agents and all such persons shall to this extent be deemed to be parties to this Contract

5 The Carrier shall not be liable for losses of valuables unless stored in the Vessel's safety depository and then not exceeding $500 in any event

6 If the Vessel carries a surgeon, physician, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the passenger and any such person in dealing with the passenger is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the Carrier and the Carrier shall not be liable for any act or omission of such person or those under his orders or assisting him with respect to treatment, advice or care of any kind given to any passenger.

The surgeon, physician, masseuse, barber, hair dresser or manicurist shall be entitled to make a proper charge for any service performed with respect to a passenger and the Carrier shall not be concerned in any way whatsoever in any such arrangement.

7. The Carrier shall not be liable for any claims whatsoever of the passenger unless full particulars thereof in writing be given to the Carrier or their agents within 185 days after the passenger shall be landed from the Vessel or in the case the voyage is abandoned within 185 days thereafter. Suit to recover any claim shall not be maintainable in any event unless commenced within one year after the date of the loss, injury or death

8 It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country

9. The Carrier, in arranging for the service called for by all shore feature coupons or shore excursion tickets, acts only as agent for the holder thereof and assumes no responsibility and in no event shall be liable for any loss, damage, injury or delay to or of said person and/or baggage, property or effects in connection with said services, nor does Carrier guarantee the performance of any such service

10 Each fully paid adult passenger will be allowed an unlimited amount of baggage free of charge. Baggage means only trunks, valises, satchels, bags, hangers and bundles with their contents consisting of only such wearing apparel, toilet articles and similar personal effects as are necessary and appropriate for the station in life of the passenger and for the purpose of the journey.

11. No tools of trade, household goods, presents and/or property of others, jewelry, money, documents, valuables of any description including but not limited to such articles as are described in Section 4281 Revised Statute of the U S A (46 USCA § 181) shall be carried except under and subject to the terms of a special written contract or Bill of Lading entered into with the Carrier prior to embarkation upon application of the passenger and the passenger hereby warrants that no such articles are contained in any receptacle or container presented by him as baggage hereunder, and if any such article or articles are shipped and the passenger's baggage in breach of this warranty no liability for negligence, gross or ordinary, shall attach to the Carrier for any loss or damage thereto.

12. It is stipulated and agreed that the aggregate value of each passenger's property under the Adult ticket does not exceed $100.00 (half ticket: $50.00) and any liability of the Carrier for any cause whatsoever with respect to said property shall not exceed such sum, unless the passenger shall in writing, delivered to the Carrier prior to embarkation, declare the true value thereof and pay to the Carrier prior to embarkation a sum (in U.S. Dollars) equal to 5% of the excess of such value, in which event the Carrier's liability shall be limited to the actual damages sustained to the property but not in excess of the declared value.

13. The Vessel shall be entitled to leave and enter ports with or without pilots or tugs, to tow and assist other vessels in any circumstances to return to or enter any port at the Master's discretion and for any purpose and to deviate in any direction or for any purpose from the direct or usual course, all such deviations being considered as forming part of and included in the proposed voyage.

14. If the performance of the proposed voyage is hindered or prevented) or in the opinion of the Carrier or the Master is likely to be hindered or prevented) by war, hostilities, blockade, ice, labor conflicts, strikes on board or ashore, Restraint of Rulers or Princes, breakdown of the Vessel, congestion, docking difficulties, or any other cause whatsoever, or if the Carrier or the Master considers that for any reason whatsoever, proceeding to, attempting to enter, or entering or remaining at the port of passenger's destination may expose the Vessel to risk or loss or damage or be likely to delay her, the passenger and his baggage may be landed at the port of embarkation or at any port or place at which the Vessel may call when the responsibility of the Carrier shall cease and this contract shall be deemed to have been fully performed, or if the passenger has not embarked the Carrier may cancel the proposed voyage without liability to refund passage money or fares paid in advance.

15. The Carrier and the Master shall have liberty to comply with any orders, recommendations or directions whatsoever given by the Government of any nation or by any Department thereof or by any person acting or purporting to act with the authority of such Government or Department or by any Committee or person having under the terms of the War Risks Insuranace on the Vessel the right to give such orders, recommendations or directions, and if by reason of and in compliance with any such orders, recommendations or directions anything is done or is not done the same shall not be deemed a deviation or a breach of this Contract. Disembarkation of any passenger or discharge of his baggage in accordance with such orders, recommendations or directions shall constitute due and proper fulfillment of the obligations of the Carrier under this Contract.

16. (a) The Carrier shall not be liable to make any refund to passengers in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger.

(b) If for any reason whatsoever the passenger is refused permission to land at the port of disembarkation or such other ports as is provided for in Clauses 14 and 15 hereof, the passenger and his baggage may be landed at any port or place at which the Vessel calls or be carried back to the port of embarkation and shall pay the Carrier full fare according to its tariff in use at such time for such further carriage, which shall be upon the terms herein contained

17. The Carrier and the Vessel shall have a lien upon all baggage, money, motor cars and other property whatsoever accompanying the passenger and the right to sell the same by public auction or otherwise for all sums whatsoever due from the passenger under this contract and for the costs and expenses of enforcing such lien and of such sale.

18. The passenger or if a minor his parent or guardian shall be liable to the Carrier and to the Master for any fines or penalties imposed on the Carrier by the authorities for his failure to observe or comply with local requirements in respect of immigration, Customs and Excise or any other Government regulations whatsoever.

19. No passenger shall be allowed to bring on board the Vessel Weapons, Firearms, Ammunition, Explosives or other dangerous goods without written permission from the Carrier.

20. The Carrier shall have liberty without previous notice to cancel at the port of embarkation or at any port this Contract and shall thereupon return to the passenger, if the Contract is cancelled at the port of embarkation, his passage money, or, if the Contract is cancelled later, a proportionate part thereof

21. The passenger warrants that he and those traveling with him are physically fit at the time of embarkation. The Carrier and Master each reserves the right to refuse passage to anyone whose health or welfare would be considered a risk to his own well-being or that of any other passenger

22. Should the Vessel deviate from its course due to passenger's negligence, said passenger or his estate shall be liable for any related costs incurred.

23. The Carrier reserves the right to increase published fares without prior notice. In the event of an increase, the passenger has the option of accepting the increased fare or cancelling reservations without penalty.

24. In addition to all of the restrictions and exemptions from liability provided in this Contract the Carrier shall have the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provided thereby, including but not limited to Sections 4282, 4282A, 4283, 4284, 4285 and 4286 of the Revised Statues of the United States of America (46 USCA Sections 182, 183, 183b, 184, 185 and 186); nothing in this Contract is intended to nor shall it operate to limit or deprive the Carrier of any such statutory limitation of or exoneration from liability.

25. Should any provision of this Contract be contrary to or invalid by virtue of the law of any jurisdiction or be so held by a Court of competent jurisdiction, such provision shall be deemed to be severed from the Contract and of no effect and all remaining provisions herein shall be in full force and effect and constitute the Contract of Carriage.

MEMORANDUM CASES

No. A-770 (90-89). International Primate Protection League and its Members, et al., Petitioners v Administrators of Tulane Educational Fund, et al.

499 US 955, 113 L Ed 2d 641, 111 S Ct 1575.

April 12, 1991. The application to recall and stay the mandate of the United States Court of Appeals for the Fifth Circuit and to reinstate the injunction of the United States District Court for the Eastern District of Louisiana, presented to Justice Kennedy, and by him referred to the Court, is denied. The order heretofore entered April 10, 1991, by Justice Kennedy is vacated. Justice Scalia took no part in the consideration or decision of this application.

No. 90-1284. InterContinental Life Insurance Company, Petitioner v Lou R. Lindblom

499 US 956, 113 L Ed 2d 641, 111 S Ct 1575.

April 15, 1991. On petition for writ of certiorari to the Supreme Court of Alabama. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Alabama for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

Same case below, 571 So 2d 1092.

No. 90-6553. Norman R. Wood, Jr., Petitioner v United States Postal Service

499 US 956, 113 L Ed 2d 641, 111 S Ct 1575.

April 15, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Irwin v Department of Veterans Affairs, 498 US 89, 112 L Ed 2d 435, 111 S Ct 453 (1990).

Same case below, 873 F2d 295.

No. ——. Anthony Grandison, Sr., Petitioner v United States

499 US 956, 113 L Ed 2d 641, 111 S Ct 1575.

April 15, 1991. The motion to direct the Clerk to file a petition for a writ of certiorari, out of time, is denied.

No. A-747. Kidder, Peabody & Co., Inc., Applicant v Maxus Energy Corporation, et al.

499 US 956, 113 L Ed 2d 642, 111 S Ct 1576.

April 15, 1991. The application for stay, addressed to Justice O'Connor and referred to the Court, is denied.

No. A-750 (90-1485). In Re Juan Perales

499 US 956, 113 L Ed 2d 642, 111 S Ct 1576.

April 15, 1991. The application for preliminary injunction and expedited hearing, addressed to Justice Marshall and referred to the Court, is denied.

No. D-933. In the Matter of Disbarment of Arnold L. Ross

499 US 956, 113 L Ed 2d 642, 111 S Ct 1576.

April 15, 1991. Disbarment order entered.

No. D-935. In the Matter of Disbarment of Peter J. Antico

499 US 956, 113 L Ed 2d 642, 111 S Ct 1576.

April 15, 1991. Disbarment order entered.

No. D-945. In the Matter of Disbarment of Edward Emmet Heavy

499 US 956, 113 L Ed 2d 642, 111 S Ct 1576.

April 15, 1991. Disbarment order entered.

No. D-958. In the Matter of Disbarment of Walton Bishop Noble

499 US 957, 113 L Ed 2d 642, 111 S Ct 1576.

April 15, 1991. Disbarment order entered.

No. D-969. In the Matter of Disbarment of Joseph J. Finkelstein

499 US 957, 113 L Ed 2d 642, 111 S Ct 1576.

April 15, 1991. Joseph J. Finkelstein, of Miami, Florida, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 25, 1991, is hereby discharged.

No. D-974. In the Matter of Disbarment of Charles B. Bowers

499 US 957, 113 L Ed 2d 642, 111 S Ct 1577.

April 15, 1991. Disbarment order entered.

No. D-991. In the Matter of Disbarment of Edward C. LeLouis

499 US 957, 113 L Ed 2d 643, 111 S Ct 1577.

April 15, 1991. It is ordered that Edward C. LeLouis, of Bakersfield, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-992. In the Matter of Disbarment of Dennis D. Crowley

499 US 957, 113 L Ed 2d 643, 111 S Ct 1577.

April 15, 1991. It is ordered that Dennis D. Crowley, of Rye, New York, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-993. In the Matter of Disbarment of Murray Berger

499 US 957, 113 L Ed 2d 643, 111 S Ct 1577.

April 15, 1991. It is ordered that Murray Berger, of Great Neck, New York, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-994. In the Matter of Disbarment of John Stephen Crosley

499 US 957, 113 L Ed 2d 643, 111 S Ct 1577.

April 15, 1991. It is ordered that John Stephen Crosley, of La Selva Beach, California, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90-813. Houston Lawyers' Association, et al., Petitioners v Attorney General of Texas, et al.

No. 90-974. League of United Latin American Citizens, et al., Petitioners v Attorney General of Texas, et al.

499 US 957, 113 L Ed 2d 643, 111 S Ct 1578.

April 15, 1991. The motion of Florida Conference of Circuit Judges, et al. for leave to file a brief as amici curiae is granted. The motion of Pacific Legal Foundation for leave to file a brief as amicus curiae in No. 90-974 is granted.

No. 90-848. Kenneth Hilton, Petitioner v South Carolina Public Railways Commission

499 US 958, 113 L Ed 2d 643, 111 S Ct 1578.

April 15, 1991. The motion of peti-

tioner to dispense with printing the joint appendix is granted.

No. 90-7160. Donald Harry Mills, Petitioner v United States

499 US 958, 113 L Ed 2d 644, 111 S Ct 1578.

April 15, 1991. The motion of petitioner for leave to proceed in forma pauperis is denied. Petitioner is allowed until May 6, 1991, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Justice Marshall and Justice Stevens, dissenting.

For the reasons expressed in Brown v Herald Co., Inc., 464 US 928, 78 L Ed 2d 301, 104 S Ct 331 (1983), we would deny the petition for a writ of certiorari without reaching the merits of the motion to proceed in forma pauperis.

No. 90-1056. Charles W. Burson, Attorney General and Reporter for Tennessee, Petitioner v Mary Rebecca Freeman

499 US 958, 113 L Ed 2d 644, 111 S Ct 1578.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Tennessee, Middle Division, granted.

Same case below, 802 SW2d 210.

No. 90-1279. Myra Jo Collins, Petitioner v City of Harker Heights, Texas

499 US 958, 113 L Ed 2d 644, 111 S Ct 1579.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

Same case below, 916 F2d 284.

No. 90-1205. United States, Petitioner v Ray Mabus, Governor of Mississippi, et al.

No. 90-6588. Jake Ayers, et al., Petitioners v Ray Mabus, Governor of Mississippi, et al.

499 US 958, 113 L Ed 2d 644, 111 S Ct 1579.

April 15, 1991. The motion of NAACP Legal Defense and Educational Fund, Inc. for leave to file a brief as amicus curiae is granted. The motion of 17 Afro-American students who formerly attended University of Mississippi for leave to file a brief as amicus curiae is granted. The motion of petitioners in No. 90-6588 for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in No. 90-1205 is granted. The petition for a writ of certiorari to the United States Court of Appeals Fifth Circuit in No. 90-6588 is granted limited to Questions 1 and 2 presented by the petition. The cases are consolidated and a total of one hour is allotted for oral argument.

Same cases below, 914 F2d 676.

No. 90-6531. Keith J. Hudson, Petitioner v Jack McMillian, et al.

499 US 958, 113 L Ed 2d 645, 111 S Ct 1579.

April 15, 1991. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

Same case below, 929 F2d 1014.

No. 90-910. Kirk L. Whitcombe, Petitioner v Weyerhaeuser Corporation, et al.

499 US 959, 113 L Ed 2d 645, 111 S Ct 1580, reh den (US) 115 L Ed 2d 990, 111 S Ct 2818.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 907 F2d 155.

No. 90-976. Anclote Manor Hospital, Inc., et al., Petitioners v Lawrence J. Lewis

499 US 959, 113 L Ed 2d 645, 111 S Ct 1580.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 912 F2d 1468.

No. 90-1068. National Rifle Association, et al., Petitioners v Nicholas F. Brady, Secretary of Treasury, et al.

499 US 959, 113 L Ed 2d 645, 111 S Ct 1580.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 475.

No. 90-1073. Marie M. McMahon, Petitioner v Charles S. Trump, IV, et al.

499 US 959, 113 L Ed 2d 645, 111 S Ct 1580.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 248.

No. 90-1076. Julius L. Chambers, Petitioner v United States Department of the Army, et al.

499 US 959, 113 L Ed 2d 645, 111 S Ct 1580.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 525.

No. 90-1080. Francis J. Bradac, et ux., Petitioners v United States

499 US 959, 113 L Ed 2d 646, 111 S Ct 1581.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 910 F2d 439.

No. 90-1106. Mike DeGeurin, Petitioner v United States

499 US 959, 113 L Ed 2d 646, 111 S Ct 1581.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 913 F2d 1118.

No. 90-1127. Railway Labor Executives' Association, et al., Petitioners v Interstate Commerce Commission, et al. (two cases)

499 US 959, 113 L Ed 2d 646, 111 S Ct 1581.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same cases below, 286 US App DC 220, 914 F2d 276 (first case) and 286 US App DC 348, 917 F2d 62 (second case).

No. 90-1143. Precise Castings, Inc., Petitioner v National Labor Relations Board

499 US 959, 113 L Ed 2d 646, 111 S Ct 1581.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 915 F2d 1160.

No. 90-1151. T. Bruce Vest, et al., Petitioners v Mahmoud Ziaee and John L. Sherlock

No. 90-1331. Mahmoud Ziaee, et al., Petitioners v T. Bruce Vest, et al.

499 US 959, 113 L Ed 2d 646, 111 S Ct 1581.

April 15, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same cases below, 916 F2d 1204.

No. 90-1157. Todd Pacific Shipyards Corporation, et al., Petitioners v Director, Office of Workers' Compensation Programs, United States Department of Labor, et al.

499 US 959, 113 L Ed 2d 646, 111 S Ct 1582.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 911 F2d 247.

No. 90-1197. David L. Fitz, Petitioner v Communications Workers of America, et al.

499 US 960, 113 L Ed 2d 647, 111 S Ct 1582.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 286 US App DC 348, 917 F2d 62.

No. 90-1217. Shirley M. Kearing, Petitioner v S. Martin Teel, Jr., Judge, United States Bankruptcy Court for the District of Columbia, et al.

499 US 960, 113 L Ed 2d 647, 111 S Ct 1582.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

No. 90-1286. Jesse James Jenkins, aka Clarence Duke McGann, Petitioner v Barnett Bank of Pensacola, et al.

499 US 960, 113 L Ed 2d 647, 111 S Ct 1582.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 843.

No. 90-1288. Allan M. Thomann, Petitioner v Illinois

499 US 960, 113 L Ed 2d 647, 111 S Ct 1582.

April 15, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Fourth District, denied.

Same case below, 197 Ill App 3d 516, 554 NE2d 755.

No. 90-1289. Allan M. Thomann, Petitioner v Illinois

499 US 960, 113 L Ed 2d 647, 111 S Ct 1583.

April 15, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Fourth District, denied.

Same case below, 197 Ill App 3d 488, 554 NE2d 748.

No. 90-1294. Chicago and North Western Transportation Company, Petitioner v Nicholas G. Byron, Judge, Circuit Court of Madison County, Illinois

499 US 960, 113 L Ed 2d 647, 111 S Ct 1583.

April 15, 1991. Petition for writ of

certiorari to the Supreme Court of Illinois denied.

No. 90-1295. William A. Cohn, Petitioner v Ralph Shankman

499 US 960, 113 L Ed 2d 648, 111 S Ct 1583.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Tennessee, Western Division, denied.

No. 90-1298. Amer Al-Zubaidi, Petitioner v M. A. Ijaz, et al.

499 US 960, 113 L Ed 2d 648, 111 S Ct 1583.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 1347.

No. 90-1299. City of Milwaukee, Petitioner v Cement Division, National Gypsum Company, et al.

499 US 960, 113 L Ed 2d 648, 111 S Ct 1583.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 915 F2d 1154.

No. 90-1301. George Hadges, Petitioner v Yonkers Racing Corporation

499 US 960, 113 L Ed 2d 648, 111 S Ct 1583.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 918 F2d 1079.

No. 90-1302. Colorado, Petitioner v Idarado Mining Co., et al.

499 US 960, 113 L Ed 2d 648, 111 S Ct 1584.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 916 F2d 1486.

No. 90-1303. Barry Massey, Petitioner v Washington

499 US 960, 113 L Ed 2d 648, 111 S Ct 1584.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Washington, Division 2, denied.

Same case below, 60 Wash App 131, 803 P2d 340.

No. 90-1304. Orlando Coriz, Jr., By and Through Next Friends, Orlando Coriz, et ux., Petitioners v Arthur Martinez and Carlos Guillen

499 US 960, 113 L Ed 2d 649, 111 S Ct 1584.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 915 F2d 1469.

No. 90-1305. Ernest Berger, Personal Representative of the Estate of Sheila Berger, Petitioner v Personal Products, Inc., aka or Merged With Johnson & Johnson Baby Products, et al.

499 US 961, 113 L Ed 2d 649, 111 S Ct 1584.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Washington denied.

Same case below, 115 Wash 2d 267, 797 P2d 1148.

No. 90-1309. General Electric Company, et al., Petitioners v Mary Alice Knight, et al.

499 US 961, 113 L Ed 2d 649, 111 S Ct 1584.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 916 F2d 829.

No. 90-1314. Marvin L. Warner, Petitioner v Ohio; and David J. Schiebel, Petitioner v Ohio

499 US 961, 113 L Ed 2d 649, 111 S Ct 1584.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Ohio denied.

Same cases below, 55 Ohio St 3d 31, 564 NE2d 18 (first case) and 55 Ohio St 3d 71, 564 NE2d 54 (second case).

No. 90-1315. Henry A. Fletcher Sr., et ux., Petitioners v District Board, United Pentecostal Church-Texas District, et al.

499 US 961, 113 L Ed 2d 649, 111 S Ct 1585.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, Ninth District, denied.

No. 90-1317. Hope Evangelical Lutheran Church, Petitioner v Iowa Department of Revenue and Finance

499 US 961, 113 L Ed 2d 649, 111 S Ct 1585.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Iowa denied.

Same case below, 463 NW2d 76.

No. 90-1318. Robert E. Hoover, Petitioner v Armco, Inc.

499 US 961, 113 L Ed 2d 650, 111 S Ct 1585.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 355.

No. 90-1319. St. Louis Southwestern Railway Company, Petitioner v Dennis Qualls

499 US 961, 113 L Ed 2d 650, 111 S Ct 1585.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Missouri denied.

Same case below, 799 SW2d 84.

No. 90-1322. Snow Mountain Pine Company, Petitioner v Public Utility Commission of Oregon, et al.

499 US 961, 113 L Ed 2d 650, 111 S Ct 1585.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Oregon denied.

Same case below, 102 Or App 687, 795 P2d 611.

No. 90-1325. Unelko Corp. and Howard G. Ohlhausen, Petitioners v Andy Rooney and CBS, Inc.

499 US 961, 113 L Ed 2d 650, 111 S Ct 1586.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 1049.

No. 90-1326. Douglas N. Washburn, Petitioner v Illinois

499 US 961, 113 L Ed 2d 650, 111 S Ct 1586.

April 15, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, Third District, denied.

Same case below, 197 Ill App 3d 655, 554 NE2d 973.

No. 90-1328. Graff Trucking Company, Inc., Petitioner v Frank J. Kelley, Attorney General of Michigan, et al.

499 US 961, 113 L Ed 2d 650, 111 S Ct 1586.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 256.

No. 90-1329. Hanjin Container Lines, Inc., Petitioner v Tokio Marine & Fire Insurance Company, Ltd., et al.

499 US 961, 113 L Ed 2d 651, 111 S Ct 1586.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 601.

No. 90-1332. Leonard Cohen, Petitioner v Ernestine Berger

499 US 962, 113 L Ed 2d 651, 111 S Ct 1586, reh den (US) 115 L Ed 2d 1010, 111 S Ct 2842.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of New York denied.

Same case below, 76 NY2d 971, 565 NE2d 514.

No. 90-1334. James Clifton Walsh, Petitioner v Virginia (two cases)

499 US 962, 113 L Ed 2d 651, 111 S Ct 1587.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Virginia denied.

No. 90-1335. Kenneth P. Nolan, Administrator of the Estate of Jean Johnson and Vernon T. Judkins, Petitioners v Boeing Company, et al.

499 US 962, 113 L Ed 2d 651, 111 S Ct 1587.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 919 F2d 1058.

No. 90-1339. Vulcan Equipment Company Limited, Petitioner v Century Wrecker Corporation

499 US 962, 113 L Ed 2d 651, 111 S Ct 1587.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 923 F2d 870.

No. 90-1343. Robert Lee Bond, Petitioner v St. Joseph's Hospital, Inc., et al.

499 US 962, 113 L Ed 2d 651, 111 S Ct 1587, reh den (US) 114 L Ed 2d 472, 111 S Ct 2068.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, Second District, denied.

No. 90-1348. Brian L. Smith, Petitioner v Town of Eaton, Indiana, et al.

499 US 962, 113 L Ed 2d 651, 111 S Ct 1587.

April 15, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Seventh Circuit denied.

Same case below, 910 F2d 1469.

No. 90-1358. Willie Oden, Louise Brand, William Jennings, and Lloyd Perrin, Petitioners v Louis W. Sullivan, Secretary of Health and Human Services

499 US 962, 113 L Ed 2d 652, 111 S Ct 1588.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 923 F2d 857.

No. 90-1374. Donald J. Treshman, Jr., Petitioner v Texas

499 US 962, 113 L Ed 2d 652, 111 S Ct 1588.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, Eleventh District, denied.

No. 90-1383. J. R. Verdugo, Petitioner v California

499 US 962, 113 L Ed 2d 652, 111 S Ct 1588, reh den (US) 115 L Ed 2d 990, 111 S Ct 2818.

April 15, 1991. Petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, denied.

No. 90-1392. William E. Currier and Robert C. Braun, Petitioners v Charles J. Baldridge and Robert Dale Osborn

499 US 962, 113 L Ed 2d 652, 111 S Ct 1588.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 914 F2d 993.

No. 90-1393. William Kuntz, III, Petitioner v City of Dayton, Ohio, et al. (two cases)

499 US 962, 113 L Ed 2d 652, 111 S Ct 1588.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Ohio, Montgomery County, denied.

No. 90-1426. Clarence Turnage, Petitioner v United States

499 US 962, 113 L Ed 2d 652, 111 S Ct 1588.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 1305.

No. 90-1439. Mohab Dimyan, Petitioner v United States

499 US 962, 113 L Ed 2d 653, 111 S Ct 1589.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 927 F2d 593.

No. 90-1453. Richard DeSciscio, Petitioner v United States; John G. Derrico, Petitioner v United States; and Frank Daniello, Petitioner v United States

499 US 962, 113 L Ed 2d 653, 111 S Ct 1589.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same cases below, 919 F2d 733.

No. 90-5946. John Albert Hinchey, Petitioner v Arizona

499 US 963, 113 L Ed 2d 653, 111 S Ct 1589, reh den (US) 115 L Ed 2d 1011, 111 S Ct 2842.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Same case below, 165 Ariz 432, 799 P2d 352.

No. 90-6179. Yolanda Candelas, Petitioner v United States

499 US 963, 113 L Ed 2d 653, 111 S Ct 1589.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 911 F2d 728.

No. 90-6328. Carl Leibowitz, Petitioner v United States, et al.

499 US 963, 113 L Ed 2d 653, 111 S Ct 1589.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 256.

No. 90-6406. James Christopher Pugh, Petitioner v United States

499 US 963, 113 L Ed 2d 653, 111 S Ct 1590.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 914 F2d 1499.

No. 90-6423. George E. Moore, Petitioner v United States

No. 90-6460. Charles R. Morse, Petitioner v United States

499 US 963, 113 L Ed 2d 654, 111 S Ct 1590.

April 15, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same cases below, 917 F2d 215.

No. 90-6463. Fred Mabery, Petitioner v Daniel Senkowski, Superintendent, Clinton Correctional Facility, et al.

499 US 963, 113 L Ed 2d 654, 111 S Ct 1590.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 22.

No. 90-6511. Phillip Gregory Tate, Petitioner v Terry L. Morris, Warden

499 US 963, 113 L Ed 2d 654, 111 S Ct 1590.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 909 F2d 1485.

No. 90-6615. Clivous Sherman, Petitioner v United States

499 US 963, 113 L Ed 2d 654, 111 S Ct 1590.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 919 F2d 744.

No. 90-6655. John Robert Demos, Jr., Petitioner v Booth Gardner, et al.

499 US 963, 113 L Ed 2d 654, 111 S Ct 1591.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-6674. Charles Anderson Miller, Petitioner v Daniel B. Vasquez, et al.

499 US 963, 113 L Ed 2d 654, 111 S Ct 1591.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 469.

No. 90-6749. Juliet Ellery, Petitioner v Grossmont Union High School District, et al.

499 US 963, 113 L Ed 2d 654, 111 S Ct 1591, reh den (US) 114 L Ed 2d 729, 111 S Ct 2278.

April 15, 1991. Petition for writ of

certiorari to the Court of Appeal of California, Fourth Appellate District, denied.

No. 90-6769. Walter Leroy Moody, Jr., Petitioner v United States

499 US 963, 113 L Ed 2d 655, 111 S Ct 1591.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

No. 90-6803. Ron B. Crossfield, Petitioner v United States

499 US 963, 113 L Ed 2d 655, 111 S Ct 1591.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 284 US App DC 258, 904 F2d 78.

No. 90-6849. John George Sahhar, Petitioner v United States

499 US 963, 113 L Ed 2d 655, 111 S Ct 1591.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 917 F2d 1197.

No. 90-7043. William Ford, Petitioner v United States

499 US 963, 113 L Ed 2d 655, 111 S Ct 1592.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7051. Alexander Ljachin, Petitioner v United States

499 US 964, 113 L Ed 2d 655, 111 S Ct 1592.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 733.

No. 90-7090. Michael Raymond Weatherford, Petitioner v Robert Brown, et al.

499 US 964, 113 L Ed 2d 655, 111 S Ct 1592.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 1305.

No. 90-7101. Lamberto Lucarelli, Petitioner v Giovanni Sinicropi, et al.

499 US 964, 113 L Ed 2d 656, 111 S Ct 1592, reh den (US) 114 L Ed 2d 474, 111 S Ct 2070.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 90-7103. James Edmond Watts, Petitioner v Douglas L. Wilder, Governor of Virginia, et al.

499 US 964, 113 L Ed 2d 656, 111 S Ct 1592, reh den (US) 114 L Ed 2d 730, 111 S Ct 2278.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 23.

No. 90-7105. Byron Stevens and William D. Smith, Petitioners v Aaron J. Johnson, et al.

499 US 964, 113 L Ed 2d 656, 111 S Ct 1592.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 914 F2d 1492.

No. 90-7107. Thomas Read, et ux., Petitioners v Charles Duck, et al.

499 US 964, 113 L Ed 2d 656, 111 S Ct 1593, reh den (US) 115 L Ed 2d 1011, 111 S Ct 2843.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 843.

No. 90-7108. Vladimir Zatko, Petitioner v California

499 US 964, 113 L Ed 2d 656, 111 S Ct 1593.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-7112. John Laskaris, Petitioner v James Morgan, Acting Superintendent, State Correctional Institution at Pittsburgh, et al.

499 US 964, 113 L Ed 2d 656, 111 S Ct 1593.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7113. Donald Brooks, Petitioner v Maryland

499 US 964, 113 L Ed 2d 656, 111 S Ct 1593.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 922 F2d 835.

No. 90-7118. Isaac Thomas, Petitioner v New Jersey, et al.

499 US 964, 113 L Ed 2d 657, 111 S Ct 1593.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 137.

No. 90-7121. David Spicy, Petitioner v Florida

499 US 964, 113 L Ed 2d 657, 111 S Ct 1593.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Florida denied.

No. 90-7127. Willard Lester England, Jr., Petitioner v Pennsylvania

499 US 964, 113 L Ed 2d 657, 111 S Ct 1594, reh den (US) 114 L Ed 2d 492, 111 S Ct 2251.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied.

No. 90-7136. Arthur Lee Ford, Petitioner v William Armontrout, Warden

499 US 964, 113 L Ed 2d 657, 111 S Ct 1594.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 916 F2d 457.

No. 90-7137. Robert Pacula, Petitioner v Ohio

499 US 964, 113 L Ed 2d 657, 111 S Ct 1594.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Ohio, Hamilton County, denied.

No. 90-7139. Billcan Scott, Petitioner v Eric C. Dahlberg, Warden

499 US 964, 113 L Ed 2d 657, 111 S Ct 1594.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 916 F2d 713.

No. 90-7141. Peter Silverbrand, Petitioner v California

499 US 965, 113 L Ed 2d 657, 111 S Ct 1594.

April 15, 1991. Petition for writ of certiorari to the Court of Appeal of

California, Third Appellate District, denied.

Same case below, 220 Cal App 3d 1621, 270 Cal Rptr 261.

No. 90-7143. Thomas Wilson, Petitioner v Harold Clarke, Warden

499 US 965, 113 L Ed 2d 658, 111 S Ct 1594, reh den (US) 114 L Ed 2d 474, 111 S Ct 2070.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

No. 90-7145. Joseph A. Bettistea, Jr., Petitioner v Michigan

499 US 965, 113 L Ed 2d 658, 111 S Ct 1595.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Michigan denied.

Same case below, 181 Mich App 194, 448 NW2d 781.

No. 90-7146. Richard L. Chandler, Petitioner v Rachel Chandler, et al.

499 US 965, 113 L Ed 2d 658, 111 S Ct 1595.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 923 F2d 869.

No. 90-7153. Michael Shemonsky, Petitioner v Camden County Probation

499 US 965, 113 L Ed 2d 658, 111 S Ct 1595.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7154. Michael Shemonsky, Petitioner v Office of Thrift Supervision

499 US 965, 113 L Ed 2d 658, 111 S Ct 1595.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 922 F2d 833.

No. 90-7156. Shane Venkatesan, Petitioner v Charles White, et al.

499 US 965, 113 L Ed 2d 658, 111 S Ct 1595, reh den (US) 115 L Ed 2d 1043, 111 S Ct 2877.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 846.

No. 90-7158. David Raymond Andrews, Petitioner v Nevada, et al.

499 US 965, 113 L Ed 2d 659, 111 S Ct 1595.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-7164. Jerome P. Lyons, Petitioner v Holmes International, Inc., et al.

499 US 965, 113 L Ed 2d 659, 111 S Ct 1596, reh den (US) 114 L Ed 2d 730, 111 S Ct 2279.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 257.

No. 90-7169. Marvin Leon Grimm, Jr., Petitioner v Edward Murray, Director, Virginia Department of Corrections, et al.

499 US 965, 113 L Ed 2d 659, 111 S Ct 1596.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Virginia denied.

No. 90-7170. S. Sharif Abdulrahman, Petitioner v Ronald Warnsley, et al.

499 US 965, 113 L Ed 2d 659, 111 S Ct 1596.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 917 F2d 25.

No. 90-7174. Rudolph John Hoff, Petitioner v Walter R. Kelly, Superintendent, Attica Correctional Facility

499 US 965, 113 L Ed 2d 659, 111 S Ct 1596.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 845.

No. 90-7177. Irene Henderson, Petitioner v United States

499 US 965, 113 L Ed 2d 659, 111 S Ct 1596.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 920 F2d 938.

No. 90-7184. Glenard Sherman Clayton, Petitioner v Oklahoma

499 US 965, 113 L Ed 2d 660, 111 S Ct 1596.

April 15, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

No. 90-7186. Vladimir Zatko, Petitioner v California

499 US 965, 113 L Ed 2d 660, 111 S Ct 1597.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

No. 90-7194. Donald Smith, Petitioner v Calgon Carbon Corporation and Merck & Company, Inc.

499 US 966, 113 L Ed 2d 660, 111 S Ct 1597, reh den (US) 115 L Ed 2d 1012, 111 S Ct 2843.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 917 F2d 1338.

No. 90-7195. Randall Barry Saksek, Petitioner v Raymond Clymer, Deputy Commissioner, Eastern Region, Pennsylvania Department of Corrections, et al.

499 US 966, 113 L Ed 2d 660, 111 S Ct 1597.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

No. 90-7196. George Sassower, Petitioner v New York

499 US 966, 113 L Ed 2d 660, 111 S Ct 1597.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

No. 90-7201. Ricardo Borroto and Estella Borroto, Petitioners v United States

499 US 966, 113 L Ed 2d 660, 111 S Ct 1597.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 915 F2d 696.

No. 90-7202. Marvin George Blake, Petitioner v California

499 US 966, 113 L Ed 2d 660, 111 S Ct 1597.

April 15, 1991. Petition for writ of certiorari to the Appellate Department, Superior Court of California, County of Los Angeles, denied.

No. 90-7205. James Duke Creel, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

499 US 966, 113 L Ed 2d 661, 111 S Ct 1598.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 90-7206. Louise Mahan, Petitioner v California

499 US 966, 113 L Ed 2d 661, 111 S Ct 1598.

April 15, 1991. Petition for writ of certiorari to the Court of Appeal of California, Sixth Appellate District, denied.

No. 90-7209. Columbus Southerland, Petitioner v Samuel Crocker

499 US 966, 113 L Ed 2d 661, 111 S Ct 1598.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 739.

No. 90-7212. Ronny Joe Lane, Petitioner v Supreme Court of Texas

499 US 966, 113 L Ed 2d 661, 111 S Ct 1598.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Texas denied.

No. 90-7213. Robert E. Hampton, Petitioner v Dave Davies, et al.

499 US 966, 113 L Ed 2d 661, 111 S Ct 1598.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

No. 90-7223. Frank Barela, Petitioner v Commissioner of Internal Revenue

499 US 966, 113 L Ed 2d 661, 111 S Ct 1598.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-7230. James Edward Wagner, Petitioner v United States

499 US 966, 113 L Ed 2d 661, 111 S Ct 1599.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

No. 90-7231. William K. Elrich, Petitioner v Union Dime Savings Bank, et al.

499 US 966, 113 L Ed 2d 662, 111 S Ct 1599, reh den (US) 114 L Ed 2d 730, 111 S Ct 2279.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 918 F2d 178.

No. 90-7234. Thomas Vetere, Petitioner v United States

499 US 966, 113 L Ed 2d 662, 111 S Ct 1599.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 918 F2d 174.

No. 90-7250. James Russell, Petitioner v United States

499 US 966, 113 L Ed 2d 662, 111 S Ct 1599.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 140.

No. 90-7251. Earl Samuel Stuart, Petitioner v United States

499 US 967, 113 L Ed 2d 662, 111 S Ct 1599.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 923 F2d 607.

No. 90-7257. Terrence Carter, Petitioner v New York

499 US 967, 113 L Ed 2d 662, 111 S Ct 1599.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of New York denied.

Same case below, 77 NY2d 95, 566 NE2d 119.

No. 90-7260. Janet Lea Ball, Petitioner v Texas

499 US 967, 113 L Ed 2d 662, 111 S Ct 1600.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, Tenth District, denied.

No. 90-7262. Carolyn Simmons, Petitioner v John O. Marsh, Secretary of the Army

499 US 967, 113 L Ed 2d 662, 111 S Ct 1600.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 23.

No. 90-7263. Vena Lasalle Culliver, Petitioner v United States

499 US 967, 113 L Ed 2d 663, 111 S Ct 1600.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 919 F2d 743.

No. 90-7265. Rita Ann Wayno, Petitioner v United States, et al.

499 US 967, 113 L Ed 2d 663, 111 S Ct 1600.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 918 F2d 181.

No. 90-7266. Edgar Salas Gonzalez-Fernandez and Jesus Francisco Duarte, Petitioners v United States

499 US 967, 113 L Ed 2d 663, 111 S Ct 1600.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-7267. Richard Savage, Petitioner v United States

499 US 967, 113 L Ed 2d 663, 111 S Ct 1600.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 920 F2d 938.

No. 90-7270. Kenneth Lee Payton, Petitioner v United States

499 US 967, 113 L Ed 2d 663, 111 S Ct 1601.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 738.

No. 90-7271. Philip Quinones, Petitioner v United States

499 US 967, 113 L Ed 2d 663, 111 S Ct 1601.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 842.

No. 90-7274. Renzalo Melton, Petitioner v United States Postal Service

499 US 967, 113 L Ed 2d 664, 111 S Ct 1601.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 923 F2d 845.

No. 90-7277. Clarence Hayes, Petitioner v Illinois

499 US 967, 113 L Ed 2d 664, 111 S Ct 1601.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 139 Ill 2d 89, 564 NE2d 803.

No. 90-7278. Zorayda Garcia-Rojas, Petitioner v United States

499 US 967, 113 L Ed 2d 664, 111 S Ct 1601.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 922 F2d 838.

No. 90-7280. Daniel Esperiqueta, Petitioner v United States

499 US 967, 113 L Ed 2d 664, 111 S Ct 1601.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 921 F2d 274.

No. 90-7285. Keith Robinson, Petitioner v United States

499 US 967, 113 L Ed 2d 664, 111 S Ct 1602.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 919 F2d 734.

No. 90-7300. Estanislao Correa de Jesus, Petitioner v United States

499 US 967, 113 L Ed 2d 664, 111 S Ct 1602.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 923 F2d 840.

No. 90-7301. Antonio Cueto, Petitioner v United States

499 US 968, 113 L Ed 2d 664, 111 S Ct 1602.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 921 F2d 284.

No. 90-7302. Dennis Gross, Petitioner v United States

499 US 968, 113 L Ed 2d 665, 111 S Ct 1602.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 23.

No. 90-7307. Dennis Craig Smith, Petitioner v United States

499 US 968, 113 L Ed 2d 665, 111 S Ct 1602.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 923 F2d 1293.

No. 90-7308. Roderick Eric Thornton, Petitioner v United States

499 US 968, 113 L Ed 2d 665, 111 S Ct 1602.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 921 F2d 284.

No. 90-7311. Arturo Delgadillo, Petitioner v Jerry Bunting, et al.

499 US 968, 113 L Ed 2d 665, 111 S Ct 1603.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 924 F2d 1055.

No. 90-7313. Charles Murphy Gillis, Petitioner v United States

499 US 968, 113 L Ed 2d 665, 111 S Ct 1603.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 23.

No. 90-7314. John B. McGee, Petitioner v Robert G. Redman, Warden

499 US 968, 113 L Ed 2d 665, 111 S Ct 1603.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 914 F2d 257.

No. 90-7316. Sergio Gongora, Petitioner v United States

499 US 968, 113 L Ed 2d 666, 111 S Ct 1603.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 921 F2d 285.

No. 90-7326. Terrance Kenneth Provost, Petitioner v United States

499 US 968, 113 L Ed 2d 666, 111 S Ct 1603.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 921 F2d 163.

No. 90-7328. Climaco Zuniga, Petitioner v United States

499 US 968, 113 L Ed 2d 666, 111 S Ct 1603.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 921 F2d 284.

No. 90-7329. Darrell A. Bowman, Petitioner v General Harleston, Warden, et al.

499 US 968, 113 L Ed 2d 666, 111 S Ct 1604.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 920 F2d 926.

No. 90-7335. Connie Lynn Casarez, Petitioner v United States

499 US 968, 113 L Ed 2d 666, 111 S Ct 1604.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 146.

No. 90-7341. Alexis Telesford, Petitioner v United States

499 US 968, 113 L Ed 2d 666, 111 S Ct 1604.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 928 F2d 398.

No. 90-7342. Ervin Whitt, Petitioner v United States

499 US 968, 113 L Ed 2d 666, 111 S Ct 1604.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 923 F2d 853.

No. 90-7346. Raphael Vasquez, Petitioner v United States

499 US 968, 113 L Ed 2d 667, 111 S Ct 1604.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 918 F2d 1129.

No. 90-7352. Kevin Williams, Petitioner v United States

499 US 968, 113 L Ed 2d 667, 111 S Ct 1604.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 919 F2d 1451.

No. 90-7354. Ottis Williams, Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

499 US 969, 113 L Ed 2d 667, 111 S Ct 1605.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 90-7357. Leocadio Coello-Rodriguez, Petitioner v United States

499 US 969, 113 L Ed 2d 667, 111 S Ct 1605.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 922 F2d 838.

No. 90-7359. Mario Diaz-Lopez, Petitioner v United States

499 US 969, 113 L Ed 2d 667, 111 S Ct 1605.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 741.

No. 90-7363. William W. Hancock, Petitioner v United States

499 US 969, 113 L Ed 2d 667, 111 S Ct 1605.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 922 F2d 838.

No. 90-7364. Olin Bradfield Kicklighter, Petitioner v United States

499 US 969, 113 L Ed 2d 668, 111 S Ct 1605.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 923 F2d 864.

No. 90-7366. Mary Cynthia Hogan, Petitioner v United States

499 US 969, 113 L Ed 2d 668, 111 S Ct 1605.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-7369. Joseph W. Cecil, Petitioner v United States

499 US 969, 113 L Ed 2d 668, 111 S Ct 1606.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 923 F2d 855.

No. 90-7379. John B. Dempsey, Petitioner v Massachusetts

499 US 969, 113 L Ed 2d 668, 111 S Ct 1606, reh den (US) 114 L Ed 2d 730, 111 S Ct 2279.

April 15, 1991. Petition for writ of certiorari to the Court of Appeals of Massachusetts denied.

Same case below, 30 Mass App 1102, 566 NE2d 117.

No. 90-7383. Walter Smith, Petitioner v United States

499 US 969, 113 L Ed 2d 668, 111 S Ct 1606.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 921 F2d 285.

No. 90-7387. Henry Louis Michel, Jr., Petitioner v James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

499 US 969, 113 L Ed 2d 668, 111 S Ct 1606.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

No. 90-7388. Creadell Hubbard, Petitioner v United States

499 US 969, 113 L Ed 2d 668, 111 S Ct 1606.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 919 F2d 734.

No. 90-7391. Mohammad Wazir Khan, Petitioner v United States

499 US 969, 113 L Ed 2d 669, 111 S Ct 1606.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 920 F2d 1100.

No. 90-7402. Mary Jean McQuarie, Petitioner v United States

499 US 969, 113 L Ed 2d 669, 111 S Ct 1607.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 919 F2d 743.

No. 90-802. William M. Kunstler, Petitioner v Joe Freeman Britt, et al.

No. 90-807. Lewis Pitts, Petitioner v Joe Freeman Britt, et al.

No. 90-1094. Barry Nakell, Petitioner v Joe Freeman Britt, et al.

499 US 969, 113 L Ed 2d 669, 111 S Ct 1607.

April 15, 1991. The motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae is granted. The motion of North Carolina Trial Lawyers for leave to file a brief as amicus curiae is granted. The motion of Benjamin R. Civiletti, et al. for leave to file a brief as amici curiae in No. 90-802 is granted. The motion of Louis Nizer, et al. for leave to file a brief as amici curiae in No. 90-802 is granted. The motion of National Council of Churches of Christ, et al. for leave to file a brief as amici curiae in No. 90-807 is granted. Petitions for writs of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same cases below, 914 F2d 505.

No. 90-1282. Rehab Amer, et vir, Petitioners v Department of Social Services, et al.

499 US 970, 113 L Ed 2d 669, 111 S Ct 1608.

April 15, 1991. The motion of respondent minor children for leave to proceed in forma pauperis without an affidavit of indigency is granted. Petition for writ of certiorari to the Court of Appeals of Michigan denied.

No. 90-1293. Gene Scroggy, Warden, Petitioner v Paul Kordenbrock

499 US 970, 113 L Ed 2d 669, 111 S Ct 1608.

April 15, 1991. The motion of re-

spondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 919 F2d 1091.

No. 90-6614. James Rodden, Petitioner v Missouri

499 US 970, 113 L Ed 2d 670, 111 S Ct 1608.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Missouri denied.

Same case below, 795 SW2d 393.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7116. Charles Lamont Robins, Petitioner v Nevada

499 US 970, 113 L Ed 2d 670, 111 S Ct 1608.

April 15, 1991. Petition for writ of certiorari to the Supreme Court of Nevada denied.

Same case below, 106 Nev 611, 798 P2d 558.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7080. Lester Leroy Hummer, Petitioner v United States

499 US 970, 113 L Ed 2d 670, 111 S Ct 1608.

April 15, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. Justice Blackmun took no part in the consideration or decision of this petition.

Same case below, 916 F2d 186.

No. 90-7386. In Re Oren Gene Gamble, Sr., Petitioner

499 US 958, 113 L Ed 2d 670, 111 S Ct 1609, reh den (US) 114 L Ed 2d 474, 111 S Ct 2070.

April 15, 1991. The petition for writ of habeas corpus is denied.

No. 90-901. Donald K. Alexander, Petitioner v Evans & Dixon Law Firm, et al.

499 US 970, 113 L Ed 2d 670, 111 S Ct 1609.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1086, 112 L Ed 2d 1047, 111 S Ct 960.

No. 90-1057. Marcie McIntire, Petitioner v Minnesota, et al.

499 US 970, 113 L Ed 2d 671, 111 S Ct 1609.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1090, 112 L Ed 2d 1056, 111 S Ct 970.

No. 90-1085. Alfred Giuffrida, Petitioner v United States

499 US 970, 113 L Ed 2d 671, 111 S Ct 1609.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1090, 112 L Ed 2d 1057, 111 S Ct 971.

No. 90-1103. Lynn Beaucoudray, et vir, Individually and on Behalf of Their Minor Child, Ann Mary Kelty, Petitioners v Douglas D. Green, et al.

499 US 970, 113 L Ed 2d 671, 111 S Ct 1609.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1090, 112 L Ed 2d 1057, 111 S Ct 971.

No. 90-6012. Otis Dolphin, Jr., Petitioner v Mr. Phipps and The Jockey Club

499 US 970, 113 L Ed 2d 671, 111 S Ct 1609.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1031, 112 L Ed 2d 678, 111 S Ct 688.

No. 90-6048. David Ware, Petitioner v Missouri

499 US 970, 113 L Ed 2d 671, 111 S Ct 1610.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1092, 112 L Ed 2d 1062, 111 S Ct 977.

No. 90-6120. Andrew Maurice Maryland, Petitioner v Larry W. Huffman, Warden, et al.

499 US 971, 113 L Ed 2d 671, 111 S Ct 1610.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1093, 112 L Ed 2d 1063, 111 S Ct 978.

No. 90-6127. Jerry Allen Taylor, Petitioner v T. K. International, Inc., Shopmen's Local 620 Union

499 US 971, 113 L Ed 2d 672, 111 S Ct 1610.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1033, 112 L Ed 2d 684, 111 S Ct 694.

No. 90-6128. Jerry Lee Word, Petitioner v United States

499 US 971, 113 L Ed 2d 672, 111 S Ct 1610.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1121, 112 L Ed 2d 1182, 111 S Ct 1077.

No. 90-6266. Ryan Michael Marshall, Petitioner v California

499 US 971, 113 L Ed 2d 672, 111 S Ct 1610.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1110, 112 L Ed 2d 1105, 111 S Ct 1023.

No. 90-6515. Warren Reginald Stevenson, Petitioner v Maryland

499 US 971, 113 L Ed 2d 672, 111 S Ct 1611.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1098, 112 L Ed 2d 1076, 111 S Ct 992.

No. 90-6544. Elmer Leon Peterson, Petitioner v North Carolina Parole Commission, et al.

499 US 971, 113 L Ed 2d 672, 111 S Ct 1611.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1100, 112 L Ed 2d 1078, 111 S Ct 995.

No. 90-6593. Norman Cowart, Petitioner v Texas

499 US 971, 113 L Ed 2d 672, 111 S Ct 1611.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1102, 112 L Ed 2d 1083, 111 S Ct 1000.

No. 90-6605. Arnold D. Mackey, Petitioner v Michigan, et al.

499 US 971, 113 L Ed 2d 672, 111 S Ct 1611.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1102, 112 L Ed 2d 1085, 111 S Ct 1002.

No. 90-6634. In Re William Kleinschmidt, Petitioner

499 US 971, 113 L Ed 2d 673, 111 S Ct 1611.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1081, 112 L Ed 2d 1109, 111 S Ct 1027.

No. 90-6663. Richard Raymond Ramirez, Petitioner v California

499 US 971, 113 L Ed 2d 673, 111 S Ct 1611.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1110, 112 L Ed 2d 1107, 111 S Ct 1025.

No. 90-6668. Fred Lawrence Robinson, Petitioner v Arizona

499 US 971, 113 L Ed 2d 673, 111 S Ct 1611.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1110, 112 L Ed 2d 1107, 111 S Ct 1025.

No. 90-6686. George Hawkins, Petitioner v Columbia First Federal Savings and Loan Association

499 US 971, 113 L Ed 2d 673, 111 S Ct 1612.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1105, 112 L Ed 2d 1092, 111 S Ct 1009.

No. 90-6711. Lawrence Alfred Landrum, Petitioner v Ohio

499 US 971, 113 L Ed 2d 673, 111 S Ct 1612.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1127, 112 L Ed 2d 1196, 111 S Ct 1092.

No. 90-6722. Deborah Byrne, Petitioner v United States

499 US 971, 113 L Ed 2d 673, 111 S Ct 1612.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1106, 112 L Ed 2d 1093, 111 S Ct 1011.

No. 90-6724. Terry Turner, Petitioner v Harold Falk, Director, Hawaii Department of Corrections, et al.

499 US 971, 113 L Ed 2d 673, 111 S Ct 1612.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 499 US 909, 113 L Ed 2d 222, 111 S Ct 1113.

No. 90-6765. Carson Lynn Brown, Petitioner v Theodore H. Koehler

499 US 971, 113 L Ed 2d 674, 111 S Ct 1612.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 499 US 909, 113 L Ed 2d 223, 111 S Ct 1115.

No. 90-6801. Olakunle 'Lanre Arigbede, Petitioner v United States

499 US 971, 113 L Ed 2d 674, 111 S Ct 1612.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1124, 112 L Ed 2d 1187, 111 S Ct 1083.

No. 90-6884. Wallace Clemons, Petitioner v Patrick Arvonio

499 US 971, 113 L Ed 2d 674, 111 S Ct 1613.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1125, 112 L Ed 2d 1191, 111 S Ct 1087.

No. 90-6944. Gerald Davis Fuller, Petitioner v Warden, Maryland Penitentiary

499 US 971, 113 L Ed 2d 674, 111 S Ct 1613.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 499 US 928, 113 L Ed 2d 261, 111 S Ct 1330.

No. 90-7036. Donald Alan Welky, Petitioner v John Prelesnik, Warden

499 US 971, 113 L Ed 2d 674, 111 S Ct 1613.

April 15, 1991. The petition for rehearing is denied.

Former Decision, 499 US 912, 113 L Ed 2d 230, 111 S Ct 1122.

[499 US 606]

AMERICAN HOSPITAL ASSOCIATION, Petitioner

v

NATIONAL LABOR RELATIONS BOARD et al.

499 US 606, 113 L Ed 2d 675, 111 S Ct 1539

[No. 90-97]

Argued February 25, 1991. Decided April 23, 1991.

Decision: NLRB rule providing that with three exceptions, eight and only eight defined employee units are appropriate for collective bargaining in acute care hospitals held not facially invalid.

SUMMARY

A bill introduced in Congress in 1973 would have extended the coverage of the National Labor Relations Act (NLRA) (29 USCS §§ 151 et seq.) to all private health care institutions, including nonprofit hospitals, while placing a limit of five on the number of bargaining units in nonprofit health care institutions. This bill did not pass, but the subsequently enacted National Labor Relations Act Amendments of 1974 (88 Stat 395) subjected all acute care hospitals to the coverage of the NLRA without changing the authority of the National Labor Relations Board (NLRB), under § 9(b) of the NLRA (29 USCS § 159(b)), to determine the appropriate bargaining unit "in each case." Both the House and the Senate committee reports on the 1974 amendments contained an admonition that due consideration should be given by the NLRB to preventing proliferation of bargaining units in the health care industry. In 1989, pursuant to its rule-making authority under § 6 of the NLRA (29 USCS § 156) and following rule-making proceedings, the NLRB promulgated a rule (29 CFR § 103.30) that established eight, and only eight, appropriate bargaining units in any acute care hospital. The rule made exceptions for (1) cases that presented extraordinary circumstances, (2) cases in which nonconforming unions already existed, and (3) cases in which labor organizations sought to combine two or more of the eight specified units. A hospital association, challenging the facial validity of the rule, brought an action against the NLRB in the United States District Court for the Northern District of Illinois, in which action it was alleged that (1) § 9(b) requires the NLRB to make a separate bargaining unit determination "in

Briefs of Counsel, p 831, infra.

each case" and therefore prohibits the NLRB from using general rules to define bargaining units; (2) the rule violated the congressional admonition with respect to the proliferation of bargaining units in the health care industry; and (3) the rule was arbitrary and capricious. The District Court, agreeing that the rule violated the congressional admonition, enjoined the rule's enforcement (718 F Supp 704). Reversing on appeal, the United States Court of Appeals for the Seventh Circuit found no merit in any of the three arguments and, accordingly, vacated the injunction (899 F2d 651).

On certiorari, the United States Supreme Court affirmed. In an opinion by STEVENS, J., expressing the unanimous view of the court, it was held that the rule was not facially invalid, in that (1) the NLRB's rule-making authority under § 6 is not limited by the "in each case" requirement of § 9(b) so as to prevent the NLRB from imposing any industrywide rule delineating appropriate bargaining units, since such a reading of § 9(b) is inconsistent with the natural meaning of the language read in the context of the statute as a whole; (2) even assuming that the congressional admonition was designed to emphasize the "in each case" requirement of § 9(b), the admonition, coupled with Congress' prior rejection of a general rule that would have imposed a limit of five on the number of bargaining units in nonprofit health care institutions, did not prevent the NLRB from imposing the eight-unit rule, given that this rule did not contravene the mandate of § 9(b) itself; (3) the rule was in keeping with the admonition, given that (a) the record of the NLRB's rule-making proceeding showed that the NLRB gave extensive consideration to the special problems that bargaining unit proliferation might create in acute care hospitals, and (b) the rule was fully consistent with two NLRB case holdings, expressly approved by the admonition, that involve the composition of health care workers' bargaining units; (4) it was in the hands of Congress to fashion a remedy for noncompliance with the admonition if Congress believed that the NLRB had not given due consideration to the proliferation issue; (5) a comment by the NLRB in a unit determination prior to the rule's promulgation—to the effect that the diverse character of the health care industry precludes generalizations about the appropriateness of any particular bargaining unit—was not inconsistent with the rule, so as to render it arbitrary or capricious; (6) even if there were inconsistencies between the rule and prior NLRB pronouncements, the rule would not be invalid, given (a) the extensive notice and comment rule making conducted by the NLRB, (b) the NLRB's careful analysis of the comments received, and (c) the fact that the NLRB's justification for the rule was based on a reasoned analysis of an extensive record; and (7) the fact that the rule might lead to an arbitrary result in a hypothetical case did not render the entire rule arbitrary or capricious so as to be invalid on its face.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Labor § 33; Statutes §§ 102, 103, 109, 134, 145.4, 160.4, 166 — appropriate bargaining units — industrywide rule — hospital employees

1a-1e. The rule-making authority of the National Labor Relations Board (NLRB) under § 6 of the National Labor Relations Act (NLRA) (29 USCS § 156) is not limited by § 9(b) of the NLRA (29 USCS § 159(b))—which provides that the NLRB shall decide "in each case" whether the appropriate bargaining unit shall be the employer unit, craft unit, plant unit, or subdivision thereof—so as to prevent the NLRB from imposing any industrywide rule delineating appropriate bargaining units, given that (1) such a reading of § 9(b) is inconsistent with

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48 Am Jur 2d, Labor and Labor Relations §§ 660-662, 692

22 Federal Procedure, L Ed, Labor and Labor Relations §§ 52:1037-52:1071

10A Am Jur Legal Forms 2d, Labor and Labor Relations § 159:194

23 Am Jur Trials 187, National Labor Relations Board Representation Case Proceedings

29 USCS § 159

RIA Employment Coordinator ¶¶ LR-17,100—LR-17,104

L Ed Digest, Labor § 33

L Ed Index, Collective Bargaining; Hospitals and Asylums; Labor and Employment

Index to Annotations, Collective Bargaining; Hospitals; Labor and Employment

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Determination of appropriate bargaining unit under § 9(b) of National Labor Relations Act (29 USCS § 159(b))—Supreme Court cases. 83 L Ed 2d 1148.

"Community of interest" test in NLRB determination of appropriateness of employee bargaining unit. 90 ALR Fed 16.

Bargaining unit determinations as to technical employees in the health care industry under 29 USCS § 159(b). 52 ALR Fed 530.

the natural meaning of the language read in the context of the statute as a whole, (2) the more natural meaning of the words "in each case" is to indicate that, whenever there is a disagreement about the appropriateness of a unit, the NLRB shall resolve the dispute, (3) the requirement that the NLRB exercise its discretion in every disputed case cannot fairly or logically be read to command the NLRB to exercise standardless discretion in each case, (4) the more natural reading of the "in each case" requirement comports with the United States Supreme Court's past interpretations of similar provisions in other regulatory statutes, (5) a rule delineating the appropriate bargaining unit for an entire industry is not qualitatively different from prior rules properly adopted by the NLRB to establish general principles to guide case-by-case bargaining unit determinations, (6) the ordinary meaning of the statutory language is supported by the structure of the NLRA, (7) the NLRA's underlying policy is served by rules that define in advance the portions of the work force in which organizing efforts may properly be conducted, (8) the legislative history of § 9(b) does not suggest that the NLRB cannot adopt generally applicable rules to guide its determination in each individual case, and (9) even if there were any ambiguity in § 9(b), the Supreme Court would still defer to the NLRB's reasonable interpretation of the statutory text; thus, § 9(b) does not render facially invalid an NLRB rule (29 CFR § 103.30) which provides that with three exceptions, eight and only eight defined employee units are appropriate for collective bargaining in acute care hospitals.

Labor § 33 — appropriate bargaining units — hospital employees — NLRB's rule-making authority — congressional admonition

2a-2f. A rule (29 CFR § 103.30) promulgated by the National Labor Relations Board (NLRB), which rule provides that with three exceptions, eight and only eight defined employee units are appropriate for collective bargaining in acute care hospitals, is not rendered facially invalid by an admonition, contained in the House and Senate committee reports on the National Labor Relations Act (NLRA) Amendments of 1974 (88 Stat 395), that due consideration should be given by the NLRB to preventing proliferation of bargaining units in the health care industry; even assuming that the admonition was designed to emphasize the requirement of § 9(b) of the NLRA (29 USCS § 159(b))—which provides that the NLRB shall decide "in each case" whether the appropriate bargaining unit shall be the employer unit, craft unit, plant unit, or subdivision thereof—the admonition, coupled with Congress' prior rejection of a general rule that would have imposed a limit of five on the number of bargaining units in nonprofit health care institutions, does not prevent the NLRB from imposing the eight-unit rule, given the United States Supreme Court's holding that this rule does not contravene the mandate of § 9(b) itself; the eight-unit rule is in keeping with the admonition, because (1) the admonition is properly read as an expression by the committees of their desire that the NLRB give due consideration to the special problems that proliferation might create in acute care hospitals, and the record of the NLRB's rule-making proceeding

shows that the NLRB gave extensive consideration to this issue, and (2) the rule is fully consistent with two NLRB case holdings, expressly approved by the admonition, that involve the composition of health care workers' bargaining units; given that the admonition is best understood as a form of notice to the NLRB that Congress might respond with a legislative remedy if the NLRB did not give appropriate consideration to the problem of proliferation, it is in the hands of Congress to fashion a remedy for noncompliance with the admonition if Congress believes that the NLRB has not given due consideration to the issue.

Labor § 33 — appropriate bargaining units — hospital employees — arbitrary or capricious NLRB rule

3a-3d. A rule (29 CFR § 103.30) promulgated by the National Labor Relations Board (NLRB), which rule provides that with three exceptions, eight and only eight defined employee units are appropriate for collective bargaining in acute care hospitals, is not arbitrary or capricious, so as to be facially invalid; a comment by the NLRB in a unit determination prior to the rule's promulgation—to the effect that the diverse character of the health care industry precludes generalizations about the appropriateness of any particular bargaining unit—is not inconsistent with the rule, so as to render it arbitrary or capricious, given that (1) the comment relates to the entire industry, whereas the rule is inapplicable to many facilities within the industry, and (2) the comment anticipates that, after records have been developed and a number of cases have been decided from those records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate; even if there were inconsistencies between the rule and prior NLRB pronouncements, the rule would not be invalid, given (1) the extensive notice and comment rule making conducted by the NLRB, (2) the NLRB's careful analysis of the comments received, and (3) the fact that the NLRB's justification for the rule was based on a reasoned analysis of an extensive record; the fact that the rule might lead to an arbitrary result in a hypothetical case does not render the entire rule arbitrary or capricious so as to be invalid on its face.

Labor § 47 — purpose of NLRA

4. The central purpose of the National Labor Relations Act (29 USCS §§ 151 et seq.) is to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations.

Labor § 33 — appropriate bargaining units

5. Section 9(a) of the National Labor Relations Act (NLRA) (29 USCS § 159(a))—which pertains to the selection of an exclusive representative for the employees in a collective bargaining unit—when read in light of the policy of the NLRA, implies that the initiative in selecting an appropriate unit resides with the employees, and the language of § 9(a) suggests that employees may seek to organize a unit that is appropriate—not necessarily the single most appropriate unit.

Administrative Law § 26 — rulemaking powers — statutory limits

6. Even if a statutory scheme requires a federal decisionmaking

agency to make individualized determinations, the decisionmaker has the authority to rely on rule making to resolve certain issues of general applicability, unless Congress clearly expresses an intent to withhold that authority.

Statutes § 1 — legal force of committee statement

7. A statement in the House and Senate committee reports on the National Labor Relations Act Amendments of 1974 (88 Stat 395)—that due consideration should be given by the National Labor Relations Board to preventing proliferation of bargaining units in the health care industry—does not have the force of law.

Labor § 48 — NLRB — validity of rules — changed view

8. Given that the authorization granted to the National Labor Relations Board (NLRB) in § 6 of the National Labor Relations Act (NLRA) (29 USCS § 156) "from time to time to make, amend, and rescind" rules and regulations expressly contemplates that the NLRB will reshape its policies on the basis of more information and experience in the administration of the NLRA, the question whether the NLRB has changed its view about certain issues or certain industries does not undermine the validity of a rule promulgated pursuant to the newer view, where the rule is based on substantial evidence and supported by a reasoned analysis.

Appeal § 1339.5 — issues presented for review

9. On certiorari to review a Federal Court of Appeals decision as to the facial validity of a rule (29 CFR § 103.30) promulgated by the National Labor Relations Board (NLRB), which rule provides that with three exceptions, eight and only eight defined employee units are appropriate for collective bargaining in acute care hospitals—where the petitioner alleges that the rule is facially invalid on the grounds that (1) the NLRB is prohibited by statute from using general rules to define bargaining units, (2) the rule violates a congressional admonition to the NLRB to avoid undue proliferation of bargaining units in the health care industry, and (3) the rule is arbitrary and capricious —the United States Supreme Court will avoid any extended comment on the wisdom of the rule, the propriety of the specific unit determinations, or the importance of avoiding work stoppages in acute care hospitals, because such matters primarily concern the NLRB's exercise of its authority rather than the limited scope of the Supreme Court's review of the legal arguments presented by the petitioner.

SYLLABUS BY REPORTER OF DECISIONS

The National Labor Relations Board has promulgated a rule providing that, with exceptions for, inter alia, cases presenting "extraordinary circumstances," eight, and only eight, defined employee units are appropriate for collective bargaining in acute care hospitals. Petitioner, American Hospital Association, brought this action challenging the rule's facial validity on the grounds that (1) § 9(b) of the National Labor Relations Act (NLRA) requires the Board to make a separate bargaining unit determination "in each case" and therefore prohibits the

Board from using general rules to define bargaining units; (2) the rule violates a congressional admonition to the Board to avoid the undue proliferation of bargaining units in the health care industry; and (3) the rule is arbitrary and capricious. The District Court agreed with petitioner's second argument and enjoined the rule's enforcement, but the Court of Appeals found no merit in any of the three arguments and reversed.

Held: The Board's rule is not facially invalid.

(a) The Board's broad rulemaking powers under § 6 of the NLRA authorize the rule and are not limited by § 9(b)'s mandate that the Board decide the appropriate bargaining unit "in each case." Contrary to petitioner's reading, the clear and more natural meaning of the "in each case" requirement is simply to indicate that whenever there is a dispute agreement between employers and employees about the appropriateness of a bargaining unit, the Board shall resolve the dispute. In doing so, the Board is entitled to rely on rules that it has developed to resolve certain issues of general applicability. See, e. g., United States v Storer Broadcasting Co. 351 US 192, 205, 100 L Ed 1081, 76 S Ct 763. The rule at issue does not differ significantly from the Board's many prior rules establishing general principles for the adjudication of bargaining unit disputes. This interpretation is reinforced by the NLRA's structure and policy. Nor is petitioner aided by § 9(b)'s sparse legislative history. Even if any ambiguity could be found in § 9(b) after application of the traditional tools of statutory construction, this Court would still defer to the Board's reasonable interpretation of the statutory text.

(b) The rule is not rendered invalid by the admonition, contained in congressional Reports accompanying the 1974 extension of NLRA coverage to all acute care hospitals, that the Board should give "[d]ue consideration . . . to preventing proliferation of bargaining units in the health care industry." The argument that the admonition—when coupled with Congress' 1973 rejection of a bill that would have placed a general limit of five on the number of hospital bargaining units—evinces an intent to emphasize the importance of § 9(b)'s "in each case" requirement is no more persuasive than petitioner's reliance on § 9(b) itself. Moreover, even if this Court accepted petitioner's further suggestion that the admonition is an authoritative statement of what Congress intended by the 1974 legislation, the admonition must be read to express the desire that the Board consider the special problems that proliferation might create in acute care hospitals. An examination of the rulemaking record reveals that the Board gave extensive consideration to this very issue. In any event, the admonition is best understood as a congressional warning to the Board, and Congress is free to fashion a remedy for noncompliance if it believes that the Board has not given "due consideration" to the problem of proliferation in this industry.

(c) The rule is not, as petitioner contends, arbitrary and capricious because it ignores critical differences among the many acute care hospitals in the country. The Board's conclusion that, absent extraordinary circumstances, such hospitals do not differ in substantial, significant ways

relating to the appropriateness of units was based on a "reasoned analysis" of an extensive rulemaking record and on the Board's years of experience in the adjudication of health care cases.

899 F2d 651, affirmed.

Stevens, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

James D. Holzhauer argued the cause for petitioner.

David L. Shapiro argued the cause for respondents.

Briefs of Counsel, p 831, infra.

OPINION OF THE COURT

[499 US 608]

Justice **Stevens** delivered the opinion of the Court.

[1a, 2a, 3a] For the first time since the National Labor Relations Board (Board or NLRB) was established in 1935, the Board has promulgated a substantive rule defining the employee units appropriate for collective bargaining in a particular line of commerce. The rule is applicable to acute care hospitals and provides, with three exceptions, that eight, and only eight, units shall be appropriate in any such hospital. The three exceptions are for cases that present extraordinary circumstances, cases in which nonconforming units already exist, and cases in which labor organizations seek to combine two or more of the eight specified units. The extraordinary circumstances exception applies automatically to hospitals in which the eight-unit rule will produce a unit of five or fewer employees. See 29 CFR § 103.30 (1990).

Petitioner, American Hospital Association, brought this action challenging the facial validity of the rule on three grounds: First, petitioner argues that § 9(b) of the National Labor Relations Act (NLRA or Act) requires the Board to make a separate bargaining unit determination "in each case" and therefore prohibits the Board from using general rules to define bargaining units; second, petitioner contends that the

[499 US 609]

rule that the Board has formulated violates a congressional admonition to the Board to avoid the undue proliferation of bargaining units in the health care industry; and, finally, petitioner maintains that the rule is arbitrary and capricious.

The United States District Court for the Northern District of Illinois agreed with petitioner's second argument and enjoined enforcement of the rule. 718 F Supp 704 (1989). The Court of Appeals found no merit in any of the three arguments and reversed. 899 F2d 651 (CA7 1990). Because of the importance of the case, we granted certiorari, 498 US 894, 112 L Ed 2d 201, 111 S Ct 242 (1990). We now affirm.

I

[4] Petitioner's first argument is a general challenge to the Board's rulemaking authority in connection with bargaining unit determinations based on the terms of the National Labor Relations Act, 49 Stat 449, 29 USC § 151 et seq. [29 USCS §§ 151 et seq.], as originally enacted in 1935. In § 1 of the NLRA Congress made the legislative finding that the "inequality of bargaining power" between unorganized employees and corporate employers had adversely affected commerce and de-

clared it to be the policy of the United States to mitigate or eliminate those adverse effects "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 USC § 151 [29 USCS § 151]. The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations.

[1b] Sections 3, 4, and 5 of the Act created the Board and generally described its powers. §§ 153-155. Section 6 granted the Board the "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the Act. § 156. This

[499 US 610]

grant was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act.

Petitioner argues that § 9(b) provides such a limitation because this section requires the Board to determine the appropriate bargaining unit "in each case." § 159(b). We are not persuaded. Petitioner would have us put more weight on these three words than they can reasonably carry.

[5] Section 9(a) of the Act provides that the representative "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" shall be the exclusive bargaining representative for all the employees in that unit. § 159(a). This section, read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize "a unit" that is "appropriate"—not necessarily *the* single most appropriate unit. See, e.g., Trustees of Masonic Hall and Asylum Fund v NLRB, 699 F2d 626, 634 (CA2 1983); State Farm Mutual Automobile Ins. Co. v NLRB, 411 F2d 356, 358 (CA7) (en banc), cert denied, 396 US 832, 24 L Ed 2d 83, 90 S Ct 87 (1969); Friendly Ice Cream Corp. v NLRB, 705 F 2d 570, 574 (CA1 1983); Local 627, Int'l Union of Operating Engineers v NLRB, 194 US App DC 37, 41, 595 F2d 844, 848 (1979); NLRB v Western & Southern Life Ins. Co. 391 F2d 119, 123 (CA3), cert denied, 393 US 978, 21 L Ed 2d 439, 89 S Ct 445 (1968). Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof.

[1c] Given the obvious potential for disagreement concerning the appropriateness of the unit selected by the union seeking recognition by the employer—disagreements that might involve rival unions claiming jurisdiction over contested segments of the work force as well as disagreements between management and labor—§ 9(b) authorizes the Board to decide whether the designated unit is appropriate. See Hearings

[499 US 611]

on S 1958 before the Senate Committee on Education and Labor, p 82 (1935) (hereinafter Hearings), 1 Legislative History of the National Labor Relations Act 1935, p 1458 (hereinafter Legislative History) (testimony of Francis Biddle, Chairman of

Board); HR Rep No. 972, 74th Cong, 1st Sess, 20 (1935), 2 Legislative History 2976. Section 9(b) provides:

> "The Board shall decide *in each case* whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (Emphasis added.)

Petitioner reads the emphasized phrase as a limitation on the Board's rulemaking powers. Although the contours of the restriction that petitioner ascribes to the phrase are murky, petitioner's reading of the language would prevent the Board from imposing any industry-wide rule delineating the appropriate bargaining units. We believe petitioner's reading is inconsistent with the natural meaning of the language read in the context of the statute as a whole.

The more natural reading of these three words is simply to indicate that whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. Under this reading, the words "in each case" are synonymous with "whenever necessary" or "in any case in which there is a dispute." Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, the decision "in each case" in which a dispute arises is to be made by the Board.

In resolving such a dispute, the Board's decision is presumably to be guided not simply by the basic policy of the Act but also by the rules that the Board develops to circumscribe and

[499 US 612]

to guide its discretion either in the process of case-by-case adjudication or by the exercise of its rulemaking authority. The requirement that the Board exercise its discretion in every disputed case cannot fairly or logically be read to command the Board to exercise standardless discretion in each case. As a noted scholar on administrative law has observed: "[T]he mandate to decide 'in each case' does not prevent the Board from supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents. Sensible men could not refuse to use such instruments and a sensible Congress would not expect them to." K. Davis, Administrative Law Text § 6.04, p 145 (3d ed 1972).

[1d, 6] This reading of the "in each case" requirement comports with our past interpretations of similar provisions in other regulatory statutes. See United States v Storer Broadcasting Co. 351 US 192, 205, 100 L Ed 1081, 76 S Ct 763 (1956); FPC v Texaco, Inc. 377 US 33, 41-44, 12 L Ed 2d 112, 84 S Ct 1105 (1964); Heckler v Campbell, 461 US 458, 467, 76 L Ed 2d 66, 103 S Ct 1952 (1983). These decisions confirm that, even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.

[1e] Even petitioner acknowledges

that "the Board could adopt rules establishing general principles to guide the required case-by-case bargaining unit determinations." Brief for Petitioner 19. Petitioner further acknowledges that the Board has created many such rules in the half-century during which it has adjudicated bargaining unit disputes. Reply Brief for Petitioner 8-11. Petitioner contends, however, that a rule delineating the appropriate bargaining unit for an entire industry is qualitatively different from these prior rules, which at most established rebuttable presumptions that certain units would be considered appropriate in certain circumstances.

[499 US 613]

We simply cannot find in the three words "in each case" any basis for the fine distinction that petitioner would have us draw. Contrary to petitioner's contention, the Board's rule is not an irrebuttable presumption; instead, it contains an exception for "extraordinary circumstances." Even if the rule did establish an irrebuttable presumption, it would not differ significantly from the prior rules adopted by the Board. As with its prior rules, the Board must still apply the rule "in each case." For example, the Board must decide in each case, among a host of other issues, whether a given facility is properly classified as an acute care hospital and whether particular employees are properly placed in particular units.

Our understanding that the ordinary meaning of the statutory language cannot support petitioner's construction is reinforced by the structure and the policy of the NLRA. As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section. And, in regard to the Act's underlying policy, the goal of facilitating the organization and recognition of unions is certainly served by rules that define in advance the portions of the work force in which organizing efforts may properly be conducted.

The sparse legislative history of the provision affords petitioner no assistance. That history reveals that the phrase was one of a group of "small amendments" suggested by the Secretary of Labor "for the sake of clarity." See Senate Committee on Education and Labor, Memorandum Comparing S 2926 and S 1958, 74th Cong, 1st Sess, 9 (Comm Print 1935), 1 Legislative History 1332, Hearings, 1442, 1445; Hearings on HR 6288 before the House Committee on Labor, 74th Cong, 1st Sess, 283-284 (1935), 2 Legislative History 2757-2758. If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect

[499 US 614]

to find some expression of that intent in the legislative history. Cf. Harrison v PPG Industries, Inc. 446 US 578, 600-601, 64 L Ed 2d 525, 100 S Ct 1889 (1980) (Rehnquist, J., dissenting).

The only other relevant legislative history adds nothing to the meaning conveyed by the text that was enacted. Petitioner relies on a comment in the House Committee on Labor Report that the matter of the appropriate unit "is obviously one

for determination in each individual case, and the only possible workable arrangement is to authorize the impartial government agency, the Board, to make that determination." HR Rep No. 972, 74th Cong, 1st Sess, 20 (1935), 2 Legislative History 2976. This comment, however, simply restates our reading of the statute as requiring that the Board decide the appropriate unit in every case in which there is a dispute. The Report nowhere suggests that the Board cannot adopt generally applicable rules to guide its "determination in each individual case."

In sum, we believe that the meaning of § 9(b)'s mandate that the Board decide the appropriate bargaining unit "in each case" is clear and contrary to the meaning advanced by petitioner. Even if we could find any ambiguity in § 9(b) after employing the traditional tools of statutory construction, we would still defer to the Board's reasonable interpretation of the statutory text. Chevron U. S. A. Inc. v Natural Resources Defense Council, Inc. 467 US 837, 842-843, 81 L Ed 2d 694, 104 S Ct 2778 (1984). We thus conclude that § 9(b) does not limit the Board's rulemaking authority under § 6.

II

[2b] Consideration of petitioner's second argument requires a brief historical review of the application of federal labor law to acute care hospitals. Hospitals were "employers" under the terms of the NLRA as enacted in 1935, but in 1947 Congress excepted not-for-profit hospitals from the coverage of the Act. See 29 USC § 152(2) (1970 ed) [29 USCS § 152(2)] (repealed, 1974). In 1960, the Board decided that proprietary hospitals

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should also be excepted, see Flatbush General Hospital, 126 NLRB 144, 145, but this position was reversed in 1967, see Butte Medical Properties, 168 NLRB 266, 268.

In 1973, Congress addressed the issue and considered bills that would have extended the Act's coverage to all private health care institutions, including not-for-profit hospitals. The proposed legislation was highly controversial, largely because of the concern that labor unrest in the health care industry might be especially harmful to the public. Moreover, the fact that so many specialists are employed in the industry created the potential for a large number of bargaining units, in each of which separate union representation might multiply management's burden in negotiation and might also increase the risk of strikes. Motivated by these concerns, Senator Taft introduced a bill that would have repealed the exemption for hospitals, but also would have placed a limit of five on the number of bargaining units in nonprofit health care institutions. S 2292, 93d Cong, 1st Sess, (1973). Senator Taft's bill did not pass.

In the second session of the same Congress, however, the National Labor Relations Act Amendments of 1974 were enacted. See 88 Stat 395. These amendments subjected all acute care hospitals to the coverage of the Act but made no change in the Board's authority to determine the appropriate bargaining unit in each case. See ibid. Both the House and the Senate Committee Reports on the legislation contained this statement:

"EFFECT ON EXISTING LAW

"Bargaining Units

"Due consideration should be given

by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in Four Seasons Nursing Center, 208 NLRB No. 50, 85 LRRM 1093 (1974), and Woodland Park Hospital, 205 NLRB No.

[499 US 616]

144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in Extendicare of West Virginia, 203 NLRB No. 170, 83 LRRM 1242 (1973).*

"* By our reference to Extendicare, we do not necessarily approve all of the holdings of that decision."

See S Rep No. 93-766, p 5 (1974); HR Rep No. 93-1051, pp 6-7 (1974).

[2c, 7] Petitioner does not—and obviously could not—contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating. Nor, in view of the fact that Congress refused to enact the Taft bill that would have placed a limit of five on the number of hospital bargaining units, does petitioner argue that eight units necessarily constitute proliferation. Rather, petitioner's primary argument is that the admonition, when coupled with the rejection of a general rule imposing a five-unit limit, evinces Congress' intent to emphasize the importance of the "in each case" requirement in § 9(b).

[2d] We find this argument no more persuasive than petitioner's reliance on § 9(b) itself. Assuming that the admonition was designed to emphasize the requirement that the Board determine the appropriate bargaining unit in each case, we have already explained that the Board's rule does not contravene this mandate. See Part I, supra.

[2e] Petitioner also suggests that the admonition "is an authoritative statement of what Congress intended when it extended the Act's coverage to include nonproprietary hospitals." Brief for Petitioner 30. Even if we accepted this suggestion, we read the admonition as an expression by the Committees of their desire that the Board give "due consideration" to the special problems that "proliferation" might create in acute care care hospitals. Examining the record of the Board's rulemaking proceeding, we find that it gave extensive

[499 US 617]

consideration to this very issue. See App 20, 78-84, 114, 122, 131, 140, 158-159, 191-194, 246-254.*

In any event, we think that the admonition in the Committee Reports is best understood as a form of notice to the Board that if it did not give appropriate consideration to the problem of proliferation in this industry, Congress might respond with a legislative remedy. So read, the remedy for noncompliance with the admonition is in the hands of the body that issued it. Cf. Public Employees Retirement System of Ohio v Betts, 492 US 158, 168, 106 L Ed 2d

* **[2f]** We further note that the Board's rule is fully consistent with the two NLRB case holdings expressly approved by the admonition. In one of those cases, the Board refused to approve a bargaining unit composed of only x-ray technicians and instead ruled that all technical workers should be grouped together. See Woodland Park Hospital, Inc. 205 NLRB 888-889 (1973). In the other case, the Board refused to permit a unit of only two employees. See Four Seasons Nursing Center of Joliet, 208 NLRB 403 (1974). The current rule authorizes a single unit for all technical workers and prohibits units of fewer than five employees. See 29 CFR § 103.30(a) (1990).

134, 109 S Ct 2854 (1989) (legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute). If Congress believes that the Board has not given "due consideration" to the issue, Congress may fashion an appropriate response.

III

[3b] Petitioner's final argument is that the rule is arbitrary and capricious because "it ignores critical differences among the more than 4,000 acute-care hospitals in the United States, including differences in size, location, operations, and work-force organization." Brief for Petitioner 39. Petitioner supports this argument by noting that in at least one earlier unit determination, the Board had commented that the diverse character of the health care industry precluded generalizations about the appropriateness of any particular bargaining unit. See St. Francis Hospital, 271 NLRB

[499 US 618]

948, 953, n 39 (1984), remanded sub nom Electrical Workers v NLRB, 259 US App DC 168, 814 F2d 697 (1987).

The Board responds to this argument by relying on the extensive record developed during the rulemaking proceedings, as well as its experience in the adjudication of health care cases during the 13-year period between the enactment of the health care amendments and its notice of proposed rulemaking. Based on that experience, the Board formed the "considered judgment" that "acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units." App 188-189. Moreover, the Board argues, the exception for "extraordinary circumstances" is adequate to take care of the unusual case in which a particular application of the rule might be arbitrary.

We do not believe that the challenged rule is inconsistent with the Board's earlier comment on diversity in the health care industry. The comment related to the entire industry whereas the rule does not apply to many facilities, such as nursing homes, blood banks, and outpatient clinics. See St. Francis, 271 NLRB, at 953, n 39. Moreover, the Board's earlier discussion "anticipate[d] that after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate." See ibid.

[3c, 8] Given the extensive notice and comment rulemaking conducted by the Board, its careful analysis of the comments that it received, and its well-reasoned justification for the new rule, we would not be troubled even if there were inconsistencies between the current rule and prior NLRB pronouncements. The statutory authorization "from time to time to make, amend, and rescind" rules and regulations expressly contemplates the possibility that the Board will reshape its policies on the basis of more information and experience in the administration of the Act. See 29 USC § 156 [29 USCS § 156]. The question whether the Board has changed its view about

[499 US 619]

certain issues or certain industries does not undermine the validity of a rule that is based on substantial evidence and supported by a "reasoned analysis." See Motor Vehicle Mfrs. Assn. of United States, Inc. v State Farm Mut. Automobile Ins. Co. 463 US 29, 42, 57, 77 L Ed 2d 443, 103 S Ct 2856 (1983).

[3d] The Board's conclusion that, absent extraordinary circumstances, "acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units," App 189, was based on a "reasoned analysis" of an extensive record. See 463 US, at 57, 77 L Ed 2d 443, 103 S Ct 2856. The Board explained that diversity among hospitals had not previously affected the results of bargaining unit determinations and that diversification did not make rulemaking inappropriate. See App 55-59. The Board justified its selection of the individual bargaining units by detailing the factors that supported generalizations as to the appropriateness of those units. See, e.g., id., at 93-94, 97, 98, 101, 118-120, 123-129, 133-140.

The fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule "arbitrary or capricious." This case is a challenge to the validity of the entire rule in all its applications. We consider it likely that presented with the case of an acute care hospital to which its application would be arbitrary, the Board would conclude that "extraordinary circumstances" justified a departure from the rule. See 29 CFR §§ 103.30(a), (b) (1990). Even assuming, however, that the Board might decline to do so, we cannot conclude the the entire rule is invalid on its face. See Illinois Commerce Commission v Interstate Commerce Commission, 249 US App DC 389, 393-394, 776 F2d 355, 359-360 (1985) (Scalia, J.); Aberdeen & Rockfish R. Co. v United States, 682 F2d 1092, 1105 (CA5 1982); cf. FDIC v Mallen, 486 US 230, 247, 100 L Ed 2d 265, 108 S Ct 1780 (1988) ("A statute such as this is not to be held unconstitutional simply because it may be applied in an arbitrary or unfair way in some hypothetical case not before the Court").

[499 US 620]

[9] In this opinion, we have deliberately avoided any extended comment on the wisdom of the rule, the propriety of the specific unit determinations, or the importance of avoiding work stoppages in acute care hospitals. We have pretermitted such discussion not because these matters are unimportant but because they primarily concern the Board's exercise of its authority rather than the limited scope of our review of the legal arguments presented by petitioner. Because we find no merit in any of these legal arguments, the judgment of the Court of Appeals is affirmed.

It is so ordered.

[499 US 621]

CALIFORNIA, Petitioner

v

HODARI D.

499 US 621, 113 L Ed 2d 690, 111 S Ct 1547

[No. 89-1632]

Argued January 14, 1991. Decided April 23, 1991.

Decision: Cocaine discarded by person fleeing police officer held not to be fruit of "seizure" within meaning of Fourth Amendment, where officer had not touched person at time cocaine was discarded.

SUMMARY

Two police officers, dressed in street clothes but wearing jackets with the word "Police" embossed on the front and back, were on patrol in an unmarked car in a high-crime area. A group of youths, including the accused, was huddled around a car parked at a curb. At the sight of the officers' car, the youths apparently panicked and fled. One of the officers left the car and ran around the block in order to intercept the accused, who had run into an alley. The accused was looking behind him as he ran and did not see the officer until the officer was almost upon him, whereupon the accused tossed away what appeared to be a small rock. Immediately thereafter, the officer tackled the accused and handcuffed him. The rock the accused had discarded was found to be crack cocaine. In a juvenile proceeding brought against the accused in California state court, the accused moved to suppress the evidence relating to the cocaine. The court denied the motion. The California Court of Appeal reversed, holding that (1) the accused had been "seized" when he saw the officer running toward him; (2) this seizure was unreasonable under the Federal Constitution's Fourth Amendment; and (3) the evidence of cocaine had to be suppressed as the fruit of the illegal seizure. The California Supreme Court denied the state's application for review.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and WHITE, BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., it was held that even if,

Briefs of Counsel, p 832, infra.

as conceded by the state, the officer's pursuit of the accused had not been based on reasonable suspicion, the cocaine discarded by the accused was not the fruit of a "seizure" of his person within the meaning of the Fourth Amendment, because (1) an arrest—the quintessential seizure of the person under Fourth Amendment jurisprudence—requires either (a) the application of physical force with lawful authority, or (b) submission to the assertion of authority; (2) the accused had not been touched by the officer at the time he discarded the cocaine; and (3) assuming that the officer's pursuit of the accused constituted a show of authority enjoining the accused to halt, the accused did not comply with that injunction and therefore was not seized until the officer tackled him.

STEVENS, J., joined by MARSHALL, J., dissented, expressing the view that under the Fourth Amendment, (1) a "seizure" occurs whenever an objective evaluation of a police officer's show of force conveys the message that a citizen is not entirely free to leave—in other words, that his or her liberty is being restrained in a significant way; and (2) the character of a citizen's response, such as the taking of evasive action, should not govern the constitutionality of the officer's conduct.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Abandoned Property § 1; Arrest § 1; Evidence § 681.5; Search and Seizure § 2 — object discarded by fugitive — admissibility — Fourth Amendment

1a-1g. An object—later found to be crack cocaine when discovered by the police—discarded by a person who is being pursued by a police officer, and who is immediately thereafter tackled by the officer, is abandoned and is not the fruit of a "seizure" of the person within the meaning of the Federal Constitution's Fourth Amendment, and therefore—even if, as conceded by the state, the officer's pursuit of the person was not based on reasonable suspicion—is not suppressible under the Fourth Amendment as the fruit of an unlawful seizure, where the officer did not touch the person be-

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

68 Am Jur 2d, Searches and Seizures § 8

8 Federal Procedure, L Ed, Criminal Procedure §§ 22:106, 22:107

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:571-20:575; 20:611 et seq.

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence

USCS, Constitution, Amendment 4

L Ed Digest, Arrest § 1; Evidence § 681.5; Search and Seizure § 2

L Ed Index, Arrest; Police; Search and Seizure

Index to Annotations, Arrest; Fourth Amendment; Police and Law Enforcement Officers; Search and Seizure

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

What constitutes "seizure" within meaning of Federal Constitution's Fourth Amendment—Supreme Court cases. 100 L Ed 2d 981.

What constitutes probable cause for arrest—Supreme Court cases. 28 L Ed 2d 978.

Admissibility of evidence obtained by illegal search and seizure—Supreme Court cases. 6 L Ed 2d 1544.

What constitute "reasonable grounds" justifying arrest of narcotics suspect without warrant under § 104(a) of Narcotics Control Act of 1956 (26 USCS § 7607(2)). 6 ALR Fed 724.

fore the object was discarded, and where, assuming that the officer's pursuit of the person constituted a show of authority enjoining him to halt, the person did not comply with that injunction, because (1) an arrest —the quintessential "seizure of the person" under Fourth Amendment jurisprudence—requires either the application of physical force with lawful authority, or, where that is absent, submission to the assertion of authority; (2) the language of the Fourth Amendment does not sustain the contention that a seizure occurs with respect to a police officer's show of authority when the subject does not yield; (3) it is not desirable, even as a policy matter, to stretch the meaning of "seizure" under the Fourth Amendment beyond the words of the Amendment and beyond the meaning of arrest, inasmuch as (a) street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged, (b) it must be presumed that only a few such orders will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones, it almost invariably is the responsible course to comply, and (c) unlawful orders will not be deterred by sanctioning, through the exclusionary rule, those of them that are not obeyed; and (4) the rule adopted by the Supreme Court in prior cases—that a person has been seized for the purposes of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave—states a necessary, but not a sufficient, condition for seizure effected through a show of authority. (Stevens and Marshall, JJ., dissented from this holding.)

Search and Seizure § 11 — seizure of person — reasonable suspicion

2. Contraband discarded by a person who is fleeing a police officer, at least if it is recognized as such by the officer, provides reasonable suspicion, under the Federal Constitution's Fourth Amendment, for the police officer's seizure of the person when the police officer tackles the person, even if the officer's pursuit of the person was initiated without reasonable suspicion.

Search and Seizure § 5 — Fourth Amendment

3. The protection contained in the Federal Constitution's Fourth Amendment against unreasonable seizures includes seizures of the person.

Arrest § 1; Search and Seizure §§ 2, 12 — physical force — discovery of contraband

4. To say that an arrest—a seizure of the person for the purposes of the Federal Constitution's Fourth Amendment—is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a continuing arrest during the period of fugitivity; if, for example, a police officer lays his hands upon a fleeing person to arrest him, but the fugitive breaks away and then discards contraband, it is not realistic to say that the contraband was discovered during the course of an arrest.

Search and Seizure § 2 — what constitutes "seizure"

5a, 5b. For purposes of the protection, under the Federal Constitution's Fourth Amendment, against unreasonable seizures, the word "sei-

zure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful, but there is no seizure when a police officer merely yells "Stop, in the name of the law!" at a fleeing form that continues to flee, and neither usage nor common-law tradition makes an attempted seizure a "seizure."

Arrest § 1; Search and Seizure § 2 — Fourth Amendment

6a, 6b. The common law of arrest defines the limits of a seizure of the person for the purposes of the Federal Constitution's Fourth Amendment.

SYLLABUS BY REPORTER OF DECISIONS

A group of youths, including respondent Hodari D., fled at the approach of an unmarked police car on an Oakland, California, street. Officer Pertoso, who was wearing a jacket with "Police" embossed on its front, left the car to give chase. Pertoso did not follow Hodari directly, but took a circuitous route that brought the two face to face on a parallel street. Hodari, however, was looking behind as he ran and did not turn to see Pertoso until the officer was almost upon him, whereupon Hodari tossed away a small rock. Pertoso tackled him, and the police recovered the rock, which proved to be crack cocaine. In the juvenile proceeding against Hodari, the court denied his motion to suppress the evidence relating to the cocaine. The State Court of Appeal reversed, holding that Hodari had been "seized" when he saw Pertoso running towards him; that this seizure was "unreasonable" under the Fourth Amendment, the State having conceded that Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari; and therefore that the evidence of cocaine had to be suppressed as the fruit of the illegal seizure.

Held: The only issue presented here—whether, at the time he dropped the drugs, Hodari had been "seized" within the meaning of the Fourth Amendment—must be answered in the negative. To answer this question, this Court looks to the common law of arrest. To constitute a seizure of the person, just as to constitute an arrest—the quintessential "seizure of the person" under Fourth Amendment jurisprudence—there must be *either* the application of physical force, however slight, *or,* where that is absent, submission to an officer's "show of authority" to restrain the subject's liberty. No physical force was applied in this case, since Hodari was untouched by Pertoso before he dropped the drugs. Moreover, assuming that Pertoso's pursuit constituted a "show of authority" enjoining Hodari to halt, Hodari did not comply with that injunction and therefore was not seized until he was tackled. Thus, the cocaine abandoned while he was running was not the fruit of a seizure, cf. Brower v Inyo County, 489 US 593, 597, 103 L Ed 2d 628, 109 S Ct 1378; Hester v United States, 265 US 57, 58, 68 L Ed 898, 44 S Ct 445, and his motion to exclude evidence of it was properly denied. United States v Mendenhall, 446 US 544, 554, 64 L Ed 2d 497, 100 S Ct 1870 (opinion of Stewart, J.), and its progeny, distinguished.

Reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Blackmun, O'Connor, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined.

APPEARANCES OF COUNSEL

Ronald E. Niver argued the cause for petitioner.

Clifford M. Sloan argued the cause for the United States as amicus curiae, in support of petitioner, by special leave of court.

James L. Lozenski argued the cause for respondent.

Briefs of Counsel, p 832, infra.

OPINION OF THE COURT

[499 US 622]

Justice **Scalia** delivered the opinion of the Court.

Late one evening in April 1988, Officers Brian McColgin and Jerry Pertoso were on patrol in a high-crime area of Oakland, California. They were dressed in street clothes but wearing jackets with "Police" embossed on both front and back. Their unmarked car proceeded west on Foothill Boulevard, and turned south onto 63rd Avenue. As they rounded the corner, they saw four or five youths huddled around a small red car parked at the curb. When the youths

[499 US 623]

saw the officers' car approaching they apparently panicked, and took flight. The respondent here, Hodari D., and one companion ran west through an alley; the others fled south. The red car also headed south, at a high rate of speed.

The officers were suspicious and gave chase. McColgin remained in the car and continued south on 63rd Avenue; Pertoso left the car, ran back north along 63rd, then west on Foothill Boulevard, and turned south on 62nd Avenue. Hodari, meanwhile, emerged from the alley onto 62nd and ran north. Looking behind as he ran, he did not turn and see Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled Hodari, handcuffed him, and radioed for assistance. Hodari was found to be carrying $130 in cash and a pager; and the rock he had discarded was found to be crack cocaine.

In the juvenile proceeding brought against him, Hodari moved to suppress the evidence relating to the cocaine. The court denied the motion without opinion. The California Court of Appeal reversed, holding that Hodari had been "seized" when he saw Officer Pertoso running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as the fruit of that illegal seizure. The California Supreme Court denied the State's application for review. We granted certiorari. 498 US 807, 112 L Ed 2d 15, 111 S Ct 38 (1990).

[1a, 2] As this case comes to us, the only issue presented is whether, at the time he dropped the drugs, Hodari had been "seized" within the meaning of the Fourth Amendment.[1] If

[499 US 624]

so, respondent argues, the drugs

1. **[1b]** California conceded below that Officer Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari, see Terry v Ohio, 392 US 1, 20 L Ed 2d 889,

were the fruit of that seizure and the evidence concerning them was properly excluded. If not, the drugs were abandoned by Hodari and lawfully recovered by the police, and the evidence should have been admitted. (In addition, of course, Pertoso's seeing the rock of cocaine, at least if he recognized it as such, would provide reasonable suspicion for the unquestioned seizure that occurred when he tackled Hodari. Cf. Rios v United States, 364 US 253, 4 L Ed 2d 1688, 80 S Ct 1431 (1960).)

[1c, 3] We have long understood that the Fourth Amendment's protection against "unreasonable . . . seizures" includes seizure of the person, see Henry v United States, 361 US 98, 100, 4 L Ed 2d 134, 80 S Ct 168 (1959). From the time of the founding to the present, the word "seizure" has meant a "taking possession," 2 N. Webster, An American Dictionary of the English Language 67 (1828); 2 J. Bouvier, A Law Dictionary 510 (6th ed 1856); Webster's Third New International Dictionary 2057 (1981). For most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control. A ship still fleeing, even though under attack, would not be considered to have been seized as a war prize. Cf. The Josefa Segunda, 10 Wheat 312, 325-326, 6 L Ed 329 (1825). A res capable of manual delivery was not seized until "tak[en] into custody." Pelham v Rose, 9 Wall 103, 106, 19 L Ed 602 (1870). To constitute an arrest, however—the quintessential "seizure of the person" under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient. See, e. g., Whitehead v Keyes, 85 Mass 495, 501 (1862) ("[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him"); 1

[499 US 625]

Restatement of Torts § 41, Comment *h* (1934). As one commentator has described it:

> "There can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant; as where the bailiff had tried to arrest one who fought him off by a fork, the court said, 'If the bailiff had touched him, that had been an arrest . . . .'" A. Cornelius, Search and Seizure 163-164 (2d ed 1930) (footnote omitted).

[1d, 4] To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example,

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88 S Ct 1868 (1968). That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ("The wicked flee when no man pursueth"). We do not decide that point here, but rely entirely upon the State's concession.

Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest. Cf. Thompson v Whitman, 18 Wall 457, 471, 21 L Ed 897 (1874) ("A seizure is a single act, and not a continuous fact"). The present case, however, is even one step further removed. It does not involve the application of any physical force; Hodari was untouched by Officer Pertoso at the time he discarded the cocaine. His defense relies instead upon the proposition that a seizure occurs "when the officer, by means of physical force *or show of authority,* has in some way restrained the liberty of a citizen." Terry v Ohio, 392 US 1, 19, n 16, 20 L Ed 2d 889, 88 S Ct 1868 (1968) (emphasis added). Hodari contends (and we accept as true for purposes of this decision) that Pertoso's pursuit qualified as a "show of authority"

[499 US 626]

calling upon Hodari to halt. The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

[1e, 5a] The language of the Fourth Amendment, of course, cannot sustain respondent's contention. The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure.[2] Nor can the result respondent wishes to achieve be produced —indirectly, as it were—by suggesting that Pertoso's uncomplied-with show of authority was a common-law arrest, and then appealing to the principle that all common-law arrests are seizures. An arrest requires *either* physical force (as described above) *or,* where that is absent, *submission* to the assertion of authority.

> "Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest
>
> [499 US 627]
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> without either touching or submission." Perkins, The Law of Arrest, 25 Iowa L Rev 201, 206 (1940) (footnotes omitted).

[1f, 6a] We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent

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2. **[5b]** For this simple reason—which involves neither "logic-chopping," post, at 646, 113 L Ed 2d, at 710, nor any arcane knowledge of legal history—it is irrelevant that English law proscribed "an unlawful *attempt* to take a presumptively innocent person into custody." Post, at 631, 113 L Ed 2d, at 701. We have consulted the common law to explain the meaning of seizure—and, contrary to the dissent's portrayal, to expand rather than contract that meaning (since one would not normally think that the mere touching of a person would suffice). But neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.

urges.[3] Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.

[1g] Respondent contends that his position is sustained by the so-called Mendenhall test, formulated by Justice Stewart's opinion in United States v Mendenhall, 446 US 544, 554, 64 L Ed 2d 497, 100 S Ct 1870 (1980), and adopted by the Court in later cases, see Michigan v Chesternut, 486 US 567, 573, 100 L Ed 2d 565, 108 S Ct 1975 (1988); INS v Delgado, 466 US 210, 215, 80 L Ed 2d 247, 104 S Ct 1758 (1984): "[A] person has been 'seized' within the

[499 US 628]

meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 US, at 554, 64 L Ed 2d 497, 100 S Ct 1870. See also Florida v Royer, 460 US 491, 502, 75 L Ed 2d 229, 103 S Ct 1319 (1983) (opinion of White, J.). In seeking to rely upon that test here, respondent fails to read it carefully. It says that a person has been seized "only if," not that he has been seized "whenever"; it states a *necessary,* but not a *sufficient,* condition for seizure—or, more precisely, for seizure effected through a "show of authority." Mendenhall established that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. Application of this objective test was the basis for our decision in the other case principally relied upon by respondent, Chesternut, supra, where we concluded that the police cruiser's slow following of the defendant did not convey the message that he was not free to disregard the police and go about his business. We did not address in Chesternut, however, the question whether, if the Mendenhall test was met—if the message that the defendant was not free to leave *had* been conveyed—a Fourth Amendment seizure would have occurred. See 486 US, at 577, 100 L Ed 2d 565, 108 S Ct 1975 (Kennedy, J., concurring).

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3. **[6b]** Nor have we ever done so. The dissent is wrong in saying that Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968) "broadened the range of encounters . . . encompassed within the term 'seizure,' " post, at 635, 113 L Ed 2d, at 703. Terry unquestionably involved conduct that would constitute a common-law seizure; its novelty (if any) was in expanding the acceptable *justification* for such a seizure, beyond probable cause. The dissent is correct that Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967) "unequivocally reject[s] the notion that the common law of arrest defines the limits of the term 'seizure' in the Fourth Amendment," post, at 637, 113 L Ed 2d, at 704. But we do not assert that it defines the limits of the term "seizure"; only that it defines the limits of a *seizure of the person.* What Katz stands for is the proposition that items which could not be subject to seizure at common law (e. g., telephone conversations) can be seized under the Fourth Amendment. That is quite different from saying that what constitutes an arrest (a seizure of the person) has changed.

Quite relevant to the present case, however, was our decision in Brower v Inyo County, 489 US 593, 596, 103 L Ed 2d 628, 109 S Ct 1378 (1989). In that case, police cars with flashing lights had chased the decedent for 20 miles—surely an adequate "show of authority"—but he did not stop until his fatal crash into a police-erected blockade. The issue was whether his death could be held to be the consequence of an unreasonable seizure in violation of the Fourth Amendment. We did not even consider the possibility that a seizure could have occurred during the course of the chase because, as we explained, that "show of authority" did not produce his stop. Id., at 597, 103 L Ed 2d 628, 109 S Ct 1378. And we discussed,

[499 US 629]

ibid., an opinion of Justice Holmes, involving a situation not much different from the present case, where revenue agents had picked up containers dropped by moonshiners whom they were pursuing without adequate warrant. The containers were not excluded as the product of an unlawful seizure because "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned." Hester v United States, 265 US 57, 58, 68 L Ed 898, 44 S Ct 445 (1924). The same is true here.

In sum, assuming that Pertoso's pursuit in the present case constituted a "show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied. We reverse the decision of the California Court of Appeal, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice **Stevens,** with whom Justice **Marshall** joins, dissenting.

The Court's narrow construction of the word "seizure" represents a significant, and in my view, unfortunate, departure from prior case law construing the Fourth Amendment.[1] Almost a quarter of a century ago, in two landmark cases—one broadening the protection of individual privacy,[2] and the other broadening the powers of law enforcement officers[3]—we rejected the method of Fourth Amendment analysis that

[499 US 630]

today's majority endorses. In particular, the Court now adopts a definition of "seizure" that is unfaithful to a long line of Fourth Amendment cases. Even if the Court were defining seizure for the first time, which it is not, the definition that it chooses today is profoundly unwise. In its decision, the Court assumes, without acknowledging, that a police officer may now fire his weapon at an innocent citizen and not impli-

1. The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."

2. Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967).

3. Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1968 (1968).

cate the Fourth Amendment—as long as he misses his target.

For the purposes of decision, the following propositions are not in dispute. First, when Officer Pertoso began his pursuit of respondent,[4] the officer did not have a lawful basis for either stopping or arresting respondent. See App 138-140; ante, at 623, n 1, 113 L Ed 2d, at 695-696. Second, the officer's chase amounted to a "show of authority" as soon as respondent saw the officer nearly upon him. See ante, at 625-626, 629, 113 L Ed 2d, at 697, 699. Third, the act of discarding the rock of cocaine was the direct consequence of the show of authority. See Pet for Cert 48-49, 52. Fourth, as the Court correctly demonstrates, no common-law arrest occurred until the officer tackled respondent. See ante, at 624-625, 113 L Ed 2d, at 696. Thus, the Court is quite right in concluding that the abandonment of the rock was not the fruit of a common-law arrest.

It is equally clear, however, that if the officer had succeeded in touching respondent before he dropped the rock—even

[499 US 631]

if he did not subdue him —an arrest would have occurred.[5] See ante, at 624-625, 626, 113 L Ed 2d, at 696, 697. In that event (assuming the touching precipitated the abandonment), the evidence would have been the fruit of an unlawful common-law arrest. The distinction between the actual case and the hypothetical case is the same as the distinction between the common-law torts of assault and battery—a touching converts the former into the latter.[6] Although the distinction between assault and battery was important for pleading purposes, see 2 J. Chitty, Pleading *372-*376, the distinction should not take on constitutional dimensions. The Court mistakenly allows this common-law distinction to define its interpretation of the Fourth Amendment.

At the same time, the Court fails to recognize the existence of another, more telling, common-law distinction—the distinction between an arrest and an attempted arrest. As the Court teaches us, the distinction between battery and assault was critical to a correct understanding of

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4. The Court's gratuitous quotation from Proverbs 28:1, see ante, at 623, n 1, 113 L Ed 2d, at 696, mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority. See generally Johnson, Race and the Decision To Detain a Suspect, 93 Yale LJ 214 (1983). It has long been "a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" Alberty v United States, 162 US 499, 511, 40 L Ed 1051, 16 S Ct 864 (1896).

5. "[I]f the officer pronounces words of arrest without an actual touching and the other immediately runs away, there is no escape (in the technical sense) because there was no arrest. It would be otherwise had the officer touched the arrestee for the purpose of apprehending him, because touching for the manifested purpose of arrest by one having lawful authority completes the apprehension, 'although he does not succeed in stopping or holding him even for an instant.'" Perkins, The Law of Arrest, 25 Iowa L Rev 201, 206 (1940) (footnotes omitted).

6. "One who undertakes to make an arrest without lawful authority, or who attempts to do so in an unlawful manner, is guilty of an assault if the other is ordered to submit to the asserted authority, is guilty of battery if he lays hands on the other for this unlawful purpose . . . ." Id., at 263 (footnotes omitted).

the common law of arrest. See ante, at 626, 113 L Ed 2d, at 697 ("An arrest requires *either* physical force . . . *or,* where that is absent, *submission* to the assertion of authority"). However, the facts of this case do not describe an actual arrest, but rather an unlawful *attempt* to take a presumptively innocent person into custody. Such an

[499 US 632]

attempt was unlawful at common law.[7] Thus, if the Court wants to define the scope of the Fourth Amendment based on the common law, it should look, not to the common law of arrest, but to the common law of attempted arrest, according to the facts of this case.

The first question, then, is whether the commmon law should define the scope of the outer boundaries of the constitutional protection against unreasonable seizures. Even if, contrary to settled precedent, traditional common-law analysis were controlling, it would still be necessary to decide whether the unlawful attempt to make an arrest should be considered a seizure within the meaning of the Fourth Amendment, and whether the exclusionary rule should apply to unlawful attempts.

I

The Court today takes a narrow view of "seizure," which is at odds with the broader view adopted by this Court almost 25 years ago. In Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967), the Court considered whether electronic surveillance conducted "without any trespass and without the seizure of any material object fell outside the ambit of the Constitution." Id., at 353, 19 L Ed 2d 576, 88 S Ct 507. Over Justice Black's powerful dissent, we rejected that "narrow view" of the Fourth Amendment and held that electronic eavesdropping is a "search and seizure" within the meaning of the Amendment. Id., at 353-354, 19 L Ed 2d 576, 88 S Ct 507. We thus endorsed the position expounded by two of the dissenting Justices in Olmstead v United States, 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928):

[499 US 633]

"Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." Id., at 476, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (Brandeis, J., dissenting).

"The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words." Id., at 488, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (Butler, J., dissenting).

Writing for the Court in Katz, Justice Stewart explained:

"Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass

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7. "[E]ven without touching the other, the officer may subject himself to liability if he undertakes to make an arrest without being privileged by law to do so.[3]

"[3] For example, an officer might be guilty of an assault because of an attempted arrest, without privilege, even if he did not succeed in touching the other. Furthermore, if the other submitted to such an arrest without physical contact, the officer is liable for false imprisonment. Gold v Bissell, 1 Wend 210 (NY Sup Ct 1828)." Id., at 201.

and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' Silverman v United States, 365 US 505, 511 [5 L Ed 2d 734, 81 S Ct 679, 97 ALR2d 1277]. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical instrusion into any given enclosure.

"We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone

[499 US 634]

booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

"The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards." 389 US, at 353-354, 19 L Ed 2d 576, 88 S Ct 507.

Significantly, in the Katz opinion, the Court repeatedly used the word "seizure" to describe the process of recording sounds that could not possibly have been the subject of a common-law seizure. See id., at 356, 357, 19 L Ed 2d 576, 88 S Ct 507.

Justice Black's reasoning, which was rejected by the Court in 1967, is remarkably similar to the reasoning adopted by the Court today. After criticizing "language-stretching judges," id., at 366, 19 L Ed 2d 576, 88 S Ct 507, Justice Black wrote:

"I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction. This principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the 'seizure' of conversations." Id., at 366-367, 19 L Ed 2d 576, 88 S Ct 507.

"Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times.' It was never meant that this Court have such power, which

in effect would make us a continuously functioning constitutional convention." Id., at 373, 19 L Ed 2d 576, 88 S Ct 507.

[499 US 635]

The expansive construction of the word "seizure" in the Katz case provided an appropriate predicate for the Court's holding in Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), the following year.[8] Prior to Terry, the Fourth Amendment proscribed any seizure of the person that was not supported by the same probable cause showing that would justify a custodial arrest.[9] See Dunaway v New York, 442 US 200, 207-209, 60 L Ed 2d 824, 99 S Ct 2248 (1979). Given the fact that street encounters between citizens and police officers "are incredibly rich in diversity," Terry, 392 US, at 13, 20 L Ed 2d 889, 88 S Ct 1868, the Court recognized the need for flexibility and held that "reasonable" suspicion—a quantum of proof less demanding than probable cause—was adequate to justify a stop for investigatory purposes. Id., at 21-22, 20 L Ed 2d 889, 88 S Ct 1868. As a corollary to the lesser justification for the stop, the Court necessarily concluded that the word "seizure" in the Fourth Amendment encompasses official restraints on individual freedom that fall short of a common-law arrest. Thus, Terry broadened the range of encounters between the police and the citizen encompassed within the term "seizure," while at the same time, lowering the standard of proof necessary to justify a "stop" in the newly expanded category of seizures

[499 US 636]

now covered by the Forth Amendment.[10] The Court explained:

> "Our first task is to establish at which point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden 'seized' Terry and whether and when he conducted a 'search.' There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search'

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8. "We have recently held that 'the Fourth Amendment protects people, not places,' Katz v United States, 389 US 347, 351 [19 L Ed 2d 576, 88 S Ct 507] (1967), and wherever an individual may harbor a reasonable 'expectation of privacy,' id., at 361 [19 L Ed 2d 576, 88 S Ct 507] (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' Elkins v United States, 364 US 206, 222 [4 L Ed 2d 1669, 80 S Ct 1437] (1960)." Terry v Ohio, 392 US, at 9, 20 L Ed 2d 889, 88 S Ct 1868.

9. Hester v United States, 265 US 57, 68 L Ed 898, 44 S Ct 445 (1924), the case on which the majority largely relies, was decided over 40 years before Terry. In that case, the defendant did not even argue that there was a seizure of his person. The Court's holding in Hester that the abandoned moonshine whiskey had not been seized simply did not address the question whether it would have been the fruit of a constitutional violation if there had been a seizure of the person before the whiskey was abandoned.

10. The Court applied this principle in Brown v Texas, 443 US 47, 61 L Ed 2d 357, 99 S Ct 2637 (1979):
"We have recognized that in some circumstances an officer may detain a suspect briefly for questioning, although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Id., at 51, 61 L Ed 2d 357, 99 S Ct 2637 (citations omitted).

or 'seizure' within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id., at 16, 20 L Ed 2d 889, 88 S Ct 1868 (footnote omitted).

"The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" Id., at 19, 20 L Ed 2d 889, 88 S Ct 1868.

[499 US 637]

The decisions in Katz and Terry unequivocally reject the notion that the common law of arrest defines the limits of the term "seizure" in the Fourth Amendment. In Katz, the Court abandoned the narrow view that would have limited a seizure to a material object, and, instead, held that the Fourth Amendment extended to the recording of oral statements. And in Terry, the Court abandoned its traditional view that a seizure under the Fourth Amendment required probable cause, and, instead, expanded the definition of a seizure to include an investigative stop made on less than probable cause. Thus, the major premise underpinning the majority's entire analysis today—that the common law of arrest should define the term "seizure" for Fourth Amendment purposes, see ante, at 624-625, 113 L Ed 2d, at 696—is seriously flawed. The Court mistakenly hearkens back to common law, while ignoring the expansive approach that the Court has taken in Fourth Amendment analysis since Katz and Terry.[11]

II

The Court fares no better when it tries to explain why the proper definition of the term "seizure" has been an open question until today. In Terry, in addition to stating that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away," 392 US, at 16, 20 L Ed 2d 889, 88 S Ct 1868, the Court noted that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . ." Id., at 19, n 16, 20 L Ed 2d 889, 88 S Ct 1868. The touchstone of a seizure is the restraint of an individual's personal liberty *"in some way."* Ibid. (emphasis added).[12] Today the Court's reaction to respondent's

11. It is noteworthy that the Court has relied so heavily on cases and commentary that antedated Katz and Terry.

12. "The essential teaching of the Court's decision in Terry—that an individual's right to personal security and freedom must be respected even in encounters with the police that fall short of full arrest—has been consistently reaffirmed." INS v Delgado, 466 US 210, 227, 80 L Ed 2d 247, 104 S Ct 1758 (1984) (Brennan, J., concurring in part and dissenting in part).

reliance on Terry

[499 US 638]

is to demonstrate that in "show of force" cases no common-law occurs unless the arrestee *submits*. See ante, at 626-627, 113 L L Ed 2d, at 697. That answer, however, is plainly insufficient given the holding in Terry that the Fourth Amendment applies to stops that need not be justified by probable cause in the absence of a full-blown arrest.

In United States v Mendenhall, 446 US 544, 64 L Ed 2d 497, 100 S Ct 1870 (1980), the Court "adhere[d] to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." Id., at 553, 64 L Ed 2d 497, 100 S Ct 1870. The Court looked to whether the citizen who is questioned "remains free to disregard the questions and walk away," and if she is able to do so, then "there has been no intrusion upon that person's liberty or privacy" that would require some "particularized and objective justification" under the Constitution. Id., at 554, 64 L Ed 2d 497, 100 S Ct 1758. The test for a "seizure," as formulated by the Court in Mendenhall, was whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Ibid. Examples of seizures include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Ibid. The Court's unwillingness today to adhere to the "reasonable person" standard, as formulated by Justice Stewart in Mendenhall, marks an unnecessary departure from Fourth Amendment case law.

The Court today draws the novel conclusion that even though no seizure can occur *unless* the Mendenhall reasonable person standard is met, see ante, at 628, 113 L Ed 2d, at 698, the fact that the standard has been met does not necessarily mean that a seizure has occurred. See ibid. (Mendenhall "states a *necessary,* but not a *sufficient* condition for seizure . . . effected

[499 US 639]

through a 'show of authority' "). If it were true that a seizure requires more than whether a reasonable person felt free to leave, then the following passage from the Court's opinion in INS v Delgado, 466 US 210, 80 L Ed 2d 247, 104 S Ct 1758 (1984), is at best, seriously misleading:

"As we have noted elsewhere: 'Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' Terry v Ohio, supra, at 19, n 16 [20 L Ed 2d 889, 88 S Ct 1868]. While applying such a test is relatively straight-forward in a situation resembling a traditional arrest, see Dunaway v New York, 442 US 200, 212-216 [60 L Ed 2d 824, 99 S Ct 2248] (1979), the protection against unreasonable seizures also extends to 'seizures that involve only a brief detention short of traditional arrest.' United States v Brignoni-Ponce, 422 US 873, 878 [45 L Ed 2d 607, 95 S Ct 2574] (1975). What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed

into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' Mendenhall, supra, at 554 [64 L Ed 2d 497, 100 S Ct 1870] (footnote omitted); see Florida v Royer, 460 US 491, 502 [75 L Ed 2d 229, 103 S Ct 1319] (1983) (plurality opinion)." Id., at 215, 80 L Ed 2d 247, 104 S Ct 1758.

More importantly, in Florida v Royer, 460 US 491 (1983), a plurality of the Court adopted Justice Stewart's formulation in Mendenhall as the appropriate standard for determining when police questioning crosses the threshold from a consensual encounter to a forcible stop. In Royer, the Court held that an illegal seizure had occurred. As a

[499 US 640]

predicate for that holding, Justice White, in his opinion for the plurality, explained that the citizen "may not be detained *even momentarily* without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. United States v Mendenhall, supra, at 556 [64 L Ed 2d 497, 100 S Ct 1870] (opinion of Stewart, J.)." 460 US, at 498, 75 L Ed 2d 229, 103 S Ct 1319 (emphasis added). The rule looks, not to the subjective perceptions of the person questioned, but rather, to the objective characteristics of the encounter that may suggest whether a reasonable person would have felt free to leave.

Even though momentary, a seizure occurs whenever an objective evaluation of a police officer's show of force conveys the message that the citizen is not entirely free to leave—in other words, that his or her liberty is being restrained in a significant way. That the Court understood the Mendenhall definition as both necessary and sufficient to describe a Fourth Amendment seizure is evident from this passage in our opinion in United States v Jacobsen, 466 US 109, 80 L Ed 2d 85, 104 S Ct 1652 (1984):

> "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.[5]
>
> "[5]See United States v Place, 462 US 696 [77 L Ed 2d 110, 103 S Ct 2637] (1983); id., at 716 [77 L Ed 2d 110, 103 S Ct 2637] (Brennan, J., concurring in result); Texas v Brown, 460 US 730, 747-748 [75 L Ed 2d 502, 103 S Ct 1535] (1983) (Stevens, J., concurring in judgment); see also United States v Chadwick, 433 US 1, 13-14, n 8 [53 L Ed 2d 538, 97 S Ct 2476] (1977); Hale v Henkel, 201 US 43, 76 [50 L Ed 652, 26 S Ct 370] (1906). While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual's freedom of movement. See Michigan v Summers, 452 US 692, 696 [69 L Ed 2d 340, 101 S Ct 2587] (1981); Reid v Georgia, 448 US 438, 440, n [65 L Ed 2d 890, 100 S Ct 2752] (1980) (per curiam); United States v Mendenhall, 446 US 544, 551-554 [64 L Ed 2d 497, 100 S Ct 1870] (1980) (opinion of Stewart, J.); Brown v Texas, 443 US 47, 50 [61 L Ed 2d 357, 99 S Ct 2637] (1979); United States v Brignoni-Ponce, 422 US 873, 878 [45 L Ed 2d 607, 95 S Ct 2574] (1975); Cupp v Murphy, 412 US 291, 294-295 [36 L Ed 2d 900, 93 S Ct 2000] (1973); Davis v Mississippi,
>
> [499 US 641]
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> 394 US 721, 726-727 [22 L Ed 2d 676, 89 S Ct 1394] (1969); Terry v Ohio, 392 US, at 16, 19, n 16 [20 L Ed 2d 889, 88 S Ct 1868]."

Id., at 113, and n 5, 80 L Ed 2d 85, 104 S Ct 1652.

Finally, it is noteworthy that in Michigan v Chesternut, 486 US 567, 100 L Ed 2d 565, 108 S Ct 1975 (1988), the State asked us to repudiate the reasonable person standard developed in Terry, Mendenhall, Delgado, and Royer.[13] We decided, however, to "adhere to our traditional contextual approach," 486 US, at 573, 100 L Ed 2d 565, 108 S Ct 1975. In our opinion, we described Justice Stewart's analysis in Mendenhall as "a test to be applied in determining whether 'a person has been "seized" within the meaning of the Fourth Amendment' " and noted that "[t]he Court has since embraced this test." 486 US, at 573, 100 L Ed 2d 565, 108 S Ct 1975. Moreover, in commenting on the virtues of the test, we explained that it focused on the police officer's conduct:

> "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." Id., at 574, 100 L Ed 2d 565, 108 S Ct 1975.

Expressing his approval of the Court's rejection of Michigan's argument in Chesternut, Professor LaFave observed:

> "The 'free to leave' concept, in other words, has nothing to do with a particular suspect's choice to flee rather than submit or with his assessment of the probability of successful flight. Were it otherwise, police would be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a Terry stop." 3 W. LaFave, Search and Seizure § 9.2, p 61 (2d ed 1987, Supp 1991).

[499 US 642]

Whatever else one may think of today's decision, it unquestionably represents a departure from earlier Fourth Amendment case law. The notion that our prior cases contemplated a distinction between seizures effected by a touching on the one hand, and those effected by a show of force on the other hand, and that all of our repeated descriptions of the Mendenhall test stated only a necessary, but not a sufficient, condition for finding seizures in the latter category, is nothing if not creative lawmaking. Moreover, by narrowing the definition of the term seizure, instead of enlarging the scope of reasonable justifications for seizures, the Court has significantly limited the protection provided to the ordinary citizen by the Fourth Amendment. As we explained in Terry:

> "The danger in the logic which proceeds upon distinctions be-

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13. "Petitioner argues that the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." Michigan v Chesternut, 486 US, at 572, 100 L Ed 2d 565, 108 S Ct 1975.

tween a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search' is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation." Terry v Ohio, 392 US, at 17, 20 L Ed 2d 889, 88 S Ct 1868.

III

In this case the officer's show of force—taking the form of a head-on chase—adequately conveyed the message that respondent was not free to leave.[14] Whereas in Mendenhall, there was "nothing in the record [to] sugges[t] that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way," 446 US, at 555, 64 L Ed 2d 497, 100 S Ct 1870, here, respondent attempted to end "the conversation" before it began and soon found himself literally "not free to leave" when confronted by an officer running toward him head-on who eventually tackled him to the ground. There was an interval of time between the moment that respondent saw the officer fast approaching and the moment when he was tackled, and thus brought under the control of the officer. The question is whether the Fourth Amendment was implicated at the earlier or the later moment.

Because the facts of this case are somewhat unusual, it is appropriate to note that the same issue would arise if the show of force took the form of a command to "freeze," a warning shot, or the sound of sirens accompanied by a patrol car's flashing lights. In any of these situations, there may be a significant time interval between the initiation of the officer's show of force and the complete submission by the citizen. At least on the facts of this case, the Court concludes that the timing of the seizure is governed by the citizen's reaction, rather than by the officer's conduct. See ante, at 626-627, 113 L Ed 2d, at 697-698. One consequence of this conclusion is that the point at which the interaction between citizen and police officer becomes a seizure occurs, not when a reasonable citizen believes he or she is no longer free to go, but, rather, only after the officer exercises control over the citizen.

In my view, our interests in effective law enforcement and in personal liberty[15] would be better served by adhering to a standard that "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth

[499 US 643]

14. The California Court of Appeal noted: "This case involves more than a pursuit, as Officer Pertoso did not pursue [respondent], but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement." App A to Pet for Cert 9.

15. "To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " Tennessee v Garner, 471 US 1, 8, 85 L Ed 2d 1, 105 S Ct 1694 (1985) (citation omitted).

[499 US 644]

Amendment." Chesternut, 486 US, at 574, 100 L Ed 2d 565, 108 S Ct 1975. The range of possible responses to a police show of force, and the multitude of problems that may arise in determining whether, and at which moment, there has been "submission," can only create uncertainty and generate litigation.

In some cases, of course, it is immediately apparent at which moment the suspect submitted to an officer's show of force. For example, if the victim is killed by an officer's gunshot,[16] as in Tennessee v Garner, 471 US 1, 11, 85 L Ed 2d 1, 105 S Ct 1694 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead"),[17] or by a hidden roadblock, as in Brower v Inyo County, 489 US 593, 103 L Ed 2d 628, 109 S Ct 1378 (1989), the submission is unquestionably complete. But what if, for example, William James Caldwell (Brower) had just been wounded before being apprehended? Would it be correct to say that no seizure had occurred and therefore the Fourth Amendment was not implicated even if the pursuing officer had no justification whatsoever for initiating the chase? The Court's opinion in Brower suggests that the officer's responsibility should not depend on the character of the victim's evasive action. The Court wrote:

> "Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet." Id., at 595, 103 L Ed 2d 628, 109 S Ct 1378.

[499 US 645]

It seems equally clear to me that the constitutionality of a police officer's show of force should be measured by the conditions that exist at the time of the officer's action. A search must be justified on the basis of the facts available at the time it is initiated; the subsequent discovery of evidence does not retroactively validate an unconstitutional search. The same approach should apply to seizures; the character of the citizen's response should not govern the constitutionality of the officer's conduct.

If an officer effects an arrest by touching a citizen, apparently the Court would accept the fact that a seizure occurred, even if the arrestee should thereafter break loose and flee. In such a case, the constitutionality of the seizure would be evaluated as of the time the officer acted. That category of seizures would then be analyzed in the same way as searches, namely, was the police action justified when it took place? It is anomalous, at best, to fashion a different rule for the subcategory of "show of force" arrests.

In cases within this new subcate-

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16. Even under the common law, "If an officer shoots at an arrestee when he is not privileged to do so, he is guilty of an aggravated assault. And if death results from an arrest, or attempted arrest, which was not authorized at all, . . . the arrester is guilty of manslaughter or, in extreme cases, of murder." Perkins, 25 Iowa L Rev, at 263-264.

17. In Tennessee v Garner, even the dissent agreed with the majority that the police officer who shot at a fleeing suspect had " 'seized' [the suspect] by shooting him." 471 US, at 25, 85 L Ed 2d 1, 105 S Ct 1694 (O'Connor, J., dissenting).

gory, there will be a period of time during which the citizen's liberty has been restrained, but he or she has not yet completely submitted to the show of force. A motorist pulled over by a highway patrol car cannot come to an immediate stop, even if the motorist intends to obey the patrol car's signal. If an officer decides to make the kind of random stop forbidden by Delaware v Prouse, 440 US 648, 59 L Ed 2d 660, 99 S Ct 1391 (1979), and, after flashing his lights, but before the vehicle comes to a complete stop, sees that the license plate has expired, can he justify his action on the ground that the seizure became lawful after it was initiated but before it was completed? In an airport setting, may a drug enforcement agent now approach a group of passengers with his gun drawn, announce a "baggage search," and rely on the passengers' reactions to justify his investigative stops? The holding of today's majority fails to recognize the coercive and intimidating nature of such behavior and creates a rule that may allow such behavior to go unchecked.

[499 US 646]

The deterrent purposes of the exclusionary rule focus on the conduct of law enforcement officers and on discouraging improper behavior on their part,[18] and not on the reaction of the citizen to the show of force. In the present case, if Officer Pertoso had succeeded in tackling respondent before he dropped the rock of cocaine, the rock unquestionably would have been excluded as the fruit of the officer's unlawful seizure. Instead, under the Court's logic-chopping analysis, the exclusionary rule has no application because an attempt to make an unconstitutional seizure is beyond the coverage of the Fourth Amendment, no matter how outrageous or unreasonable the officer's conduct may be.

It is too early to know the consequences of the Court's holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they

[499 US 647]

may still have. It is not too soon, however, to note the irony in the fact that the Court's own justification for

18. The purpose of the Fourth Amendment is " 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' " INS v Delgado, 466 US, at 215, 80 L Ed 2d 247, 104 S Ct 1758 (quoting United States v Martinez-Fuerte, 428 US 543, 554, 49 L Ed 2d 1116, 96 S Ct 3074 (1976)); see Mendenhall, 446 US, at 553-554, 64 L Ed 2d 497, 100 S Ct 1870 (same); Terry v Ohio, 392 US at 12, 20 L Ed 2d 889, 88 S Ct 1868 ("Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct"); 4 W. LaFave, Search and Seizure § 11.4(j), pp 459-460 (2d ed 1987) ("Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases").

Justice Brandeis wrote eloquently about the overarching purpose of the Fourth Amendment:

"The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v United States, 277 US 438, 478, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J., dissenting).

Today's opinion has lost sight of these purposes.

its result is its analysis of the rules of the common law of arrest that antedated our decisions in Katz and Terry. Yet, even in those days the common law provided the citizen with protection against an attempt to make an unlawful arrest. See nn 5 and 7, supra. The central message of Katz and Terry was that the protection the Fourth Amendment provides to the average citizen is not rigidly confined by ancient common-law precept. The message that today's literal-minded majority conveys is that the common law, rather than our understanding of the Fourth Amendment as it has developed over the last quarter of a century, defines, and limits, the scope of a seizure. The Court today defines a seizure as commencing, not with egregious police conduct, but rather with submission by the citizen. Thus, it both delays the point at which "the Fourth Amendment becomes relevant"[19] to an encounter and limits the range of encounters that will come under the heading of "seizure." Today's qualification of the Fourth Amendment means that innocent citizens may remain "secure in their persons . . . against unreasonable searches and seizures" only at the discretion of the police.[20]

Some sacrifice of freedom always accompanies an expansion in the executive's unreviewable[21] law enforcement powers.

[499 US 648]

A court more sensitive to the purposes of the Fourth Amendment would insist on greater rewards to society before decreeing the sacrifice it makes today. Alexander Bickel presciently wrote that "many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."[22] The Court's immediate concern with containing criminal activity poses a substantial, though unintended, threat to values that are fundamental and enduring.

I respectfully dissent.

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19. Terry v Ohio, 392 US, at 16, 20 L Ed 2d 889, 88 S Ct 1868.

20. Justice Jackson presaged this development when he wrote:

"[A]n illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. . . . The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." Brinegar v United States, 338 US 160, 182, 93 L Ed 1879, 69 S Ct 1302 (1949) (dissenting opinion).

21. "[T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court. . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." Id., at 181, 93 L Ed 1879, 69 S Ct 1302 (Jackson, J., dissenting).

22. The Least Dangerous Branch 24 (1962).

MEMORANDUM CASES

No. 88-7301. Robert William Gorman, Petitioner v Maryland

499 US 971, 113 L Ed 2d 712, 111 S Ct 1613.

April 22, 1991. On petition for writ of certiorari to the Court of Appeals of Maryland. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals of Maryland for further consideration in light of Powers v Ohio, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364 (1991).

Same case below, 315 Md 402, 554 A2d 1203.

No. 89-6271. Quang Ngoc Bui, Petitioner v Alabama

499 US 971, 113 L Ed 2d 712, 111 S Ct 1613.

April 22, 1991. On petition for writ of certiorari to the Supreme Court of Alabama. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Alabama for further consideration in light of Powers v Ohio, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364 (1991).

Same case below, 551 So 2d 1125.

No. 90-213. Louis A. LaRaia, Petitioner v Pennsylvania

499 US 972, 113 L Ed 2d 712, 111 S Ct 1614.

April 22, 1991. On petition for writ of certiorari to the Superior Court of Pennsylvania, Pittsburgh Office. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Superior Court of Pennsylvania, Pittsburgh Office, for further consideration in light of Powers v Ohio, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364 (1991).

Same case below, 387 Pa Super 649, 559 A2d 963.

No. 90-904. Miami Herald Publishing Company, et al., Petitioners v Department of Revenue, et al.

499 US 972, 113 L Ed 2d 712, 111 S Ct 1614.

April 22, 1991. On petition for writ of certiorari to the Supreme Court of Florida. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of Leathers v Medlock, 499 US 439, 113 L Ed 2d 494, 111 S Ct 1438 (1991).

Same case below, 565 So 2d 1304.

No. 90-1222. Carnival Cruise Lines, Inc., Petitioner v Superior Court of California, County of Los Angeles (Mildred Williams, et al., Real Parties in Interest)

499 US 972, 113 L Ed 2d 713, 111 S Ct 1614.

April 22, 1991. On petition for writ of certiorari to the Court of Appeal of California, Second Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of Carnival Cruise Lines, Inc. v Shute, 499 US 585, 113 L Ed 2d 622, 111 S Ct 1522 (1991).

Same case below, 222 Cal App 3d 1548, 272 Cal Rptr 515.

No. 90-1369. AMCA International Finance Company, et al., Petitioners v Steven K. Hilgedick, et al.

499 US 972, 113 L Ed 2d 713, 111 S Ct 1614.

April 22, 1991. On petition for writ of certiorari to the Court of Appeal of California, First Appellate District. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, First Appellate District, for further consideration in light of Pacific Mutual Life Insurance Company v Haslip, 499 US 1, 113 L Ed 2d 1, 111 S Ct 1032 (1991).

No. 90-1371. William Stephenson, Petitioner v McLean Contracting Company, Inc.

499 US 972, 113 L Ed 2d 713, 111 S Ct 1615.

April 22, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of McDermott International, Inc. v Wilander, 498 US 337, 112 L Ed 2d 866, 111 S Ct 807 (1991).

Same case below, 919 F2d 139.

No. 90-5491. Edwin David Congdon, Petitioner v Georgia

499 US 972, 113 L Ed 2d 713, 111 S Ct 1615.

April 22, 1991. On petition for writ of certiorari to the Supreme Court of Georgia. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of Powers v Ohio, 499 US 400, 113 L Ed 2d 411, 111 S Ct 1364 (1991).

Same case below, 260 Ga 173, 391 SE2d 402.

No. A-751. D. Georgiou, Applicant v George A. Gauthier

499 US 972, 113 L Ed 2d 714, 111 S Ct 1615.

April 22, 1991. The application for stay, addressed to Justice Blackmun and referred to the Court, is denied.

No. A-771. John J. Joubert, IV, Applicant v John R. McKernan, Jr., Governor of Maine, et al.

499 US 972, 113 L Ed 2d 714, 111 S Ct 1615.

April 22, 1991. The application for stay of mandate of the Supreme Judicial Court of Maine, addressed to Justice Marshall and referred to the Court, is denied.

No. D-964. In the Matter of Disbarment of Howard Alan Levine

499 US 973, 113 L Ed 2d 714, 111 S Ct 1615.

April 22, 1991. Disbarment order entered.

No. D-968. In the Matter of Disbarment of James Cannon, Jr.

499 US 973, 113 L Ed 2d 714, 111 S Ct 1616.

April 22, 1991. Disbarment order entered.

No. D-995. In the Matter of Disbarment of James Russell Tucker

499 US 973, 113 L Ed 2d 714, 111 S Ct 1616.

April 22, 1991. It is ordered that James Russell Tucker, of Dallas, Texas, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-996. In the Matter of Disbarment of Glenn Arnold Bergmann

499 US 973, 113 L Ed 2d 714, 111 S Ct 1616.

April 22, 1991. It is ordered that Glenn Arnold Bergmann, of Denver, Colorado, be suspended from the practice of law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90-456. William K. Reilly, Administrator, Environmental Protection Agency, et al., Petitioners v Roberta Delaney, et al.

499 US 973, 113 L Ed 2d 714, 111 S Ct 1616.

April 22, 1991. The motion of respondents for attorney's fees is denied without prejudice to refiling in the United States Court of Appeals for the Ninth Circuit.

No. 90-516. Jill S. Kamen, Petitioner v Kemper Financial Services, Inc., et al.

499 US 973, 113 L Ed 2d 715, 111 S Ct 1616.

April 22, 1991. The motion of respondent Kemper Financial Services, Inc., for leave to file a supplemental brief after argument is granted.

No. 90-681. Barbara Hafer, Petitioner v James C. Melo, Jr., et al.

499 US 973, 113 L Ed 2d 715, 111 S Ct 1617.

April 22, 1991. The motion of National Association of Counties, et al. for leave to file a brief as amici curiae is granted.

No. 90-1167. Board of Public Education and Orphanage for Bibb County, et al., Petitioners v David Lucas, et al.

499 US 973, 113 L Ed 2d 715, 111 S Ct 1617.

April 22, 1991. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90-1173. Public Service Company of Colorado, et al., Petitioners v Willard A. Thompson

499 US 973, 113 L Ed 2d 715, 111 S Ct 1617.

April 22, 1991. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90-6297. Joseph Williams, Petitioner v United States

499 US 973, 113 L Ed 2d 715, 111 S Ct 1617.

April 22, 1991. The motion for appointment of counsel is granted and it is ordered that Kenneth H. Hanson, Esquire, of Chicago, Illinois, be appointed to serve as counsel for the petitioner in this case.

No. 90-6669. Gary Zink, Petitioner v California State Board of Equalization

499 US 974, 113 L Ed 2d 715, 111 S Ct 1617.

April 22, 1991. The motion of petitioner for reconsideration of denial of motion for leave to proceed in forma pauperis is denied.

No. 90-1156. New Orleans Public Service Inc., Petitioner v Council of the City of New Orleans, et al.

499 US 974, 113 L Ed 2d 715, 111 S Ct 1617.

April 22, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Fifth Circuit granted.

Same case below, 911 F2d 993.

No. 90-727. Robert G. Holmes, Jr., Petitioner v Securities Investor Protection Corporation, et al.

499 US 974, 113 L Ed 2d 716, 111 S Ct 1618.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Question 1 presented by the petition.

Same case below, 908 F2d 1461.

No. 90-1124. Keith Jacobson, Petitioner v United States

499 US 974, 113 L Ed 2d 716, 111 S Ct 1618.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to Question 3 presented by the petition.

Same case below, 916 F2d 467.

No. 90-6861. John J. McCarthy, Petitioner v Mr. Madigan, et al.

499 US 974, 113 L Ed 2d 716, 111 S Ct 1618.

April 22, 1991. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted.

Same case below, 914 F2d 1411.

No. 89-1927. United States, Petitioner v Resolution Trust Corporation

499 US 974, 113 L Ed 2d 716, 111 S Ct 1618.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 887 F2d 593.

No. 89-1928. Commissioner of Internal Revenue, Petitioner v San Antonio Savings Association and Subsidiaries (Resolution Trust Corporation, Receiver)

499 US 974, 113 L Ed 2d 716, 111 S Ct 1618.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 887 F2d 577.

No. 89-1987. Commissioner of Internal Revenue, Petitioner v Federal National Mortgage Association

499 US 974, 113 L Ed 2d 717, 111 S Ct 1619.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 283 US App DC 53, 896 F2d 580.

No. 89-7588. Troy Clyde Kamekona, Petitioner v California

499 US 975, 113 L Ed 2d 717, 111 S Ct 1619.

April 22, 1991. Petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District, denied.

No. 90-582. Benton, Benton & Benton, Petitioner v Lousiana Public Facilities Authority, et al.

499 US 975, 113 L Ed 2d 717, 111 S Ct 1619.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 897 F2d 198.

No. 90-726. Mitchell's Formal Wear, Inc., Petitioner v Kentucky Oaks Mall Company

499 US 975, 113 L Ed 2d 717, 111 S Ct 1619.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Ohio denied.

Same case below, 53 Ohio St 3d 73, 559 NE2d 477.

No. 90-829. City of Faith Medical and Research Center, Petitioner v Ruth H. Creech

499 US 975, 113 L Ed 2d 717, 111 S Ct 1619.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 908 F2d 75.

No. 90-871. Connecticut, et al., Petitioners v Mashantucket Pequot Tribe

499 US 975, 113 L Ed 2d 717, 111 S Ct 1620.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 913 F2d 1024.

No. 90-1011. Thomas Edward Nevis, Petitioner v United States

499 US 975, 113 L Ed 2d 718, 111 S Ct 1620.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 470.

No. 90-1055. James Othel Boruff, Petitioner v United States

499 US 975, 113 L Ed 2d 718, 111 S Ct 1620.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 909 F2d 111.

No. 90-1086. California Association of the Physically Handicapped, Inc., Petitioner v Federal Communications Commission

499 US 975, 113 L Ed 2d 718, 111 S Ct 1620.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 905 F2d 1540.

No. 90-1174. Sheila Jackson Stossier, Petitioner v Gerhard Simon Stossier

499 US 975, 113 L Ed 2d 718, 111 S Ct 1620.

April 22, 1991. Petition for writ of certiorari to the Court of Appeals of Virginia denied.

No. 90-1213. Linda McMahon, Director, California Department of Social Services, et al., Petitioners v Victoria Grimesy, et al.

499 US 975, 113 L Ed 2d 718, 111 S Ct 1620.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 876 F2d 738.

No. 90-1215. Ilse Heinemeyer, Petitioner v Joseph P. O'Donnell

499 US 975, 113 L Ed 2d 718, 111 S Ct 1621, reh den (US) 115 L Ed 2d 990, 111 S Ct 2818.

April 22, 1991. Petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division, denied.

No. 90-1218. Benny Bailey, et al., Petitioners v Lynn Martin, Secretary of Labor

499 US 975, 113 L Ed 2d 718, 111 S Ct 1621.

April 22, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Fifth Circuit denied.

No. 90-1229. Environmental Waste Control, Inc., dba Four County Landfill, et al., Petitioners v United States Environmental Protection Agency, et al.

499 US 975, 113 L Ed 2d 719, 111 S Ct 1621.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 917 F2d 327.

No. 90-1273. Titan Capital Corporation, Petitioner v Kay Hollinger, et al.

499 US 976, 113 L Ed 2d 719, 111 S Ct 1621.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 1564.

No. 90-1351. John Judice, et ux., Petitioners v Sam Parich, et al.

499 US 976, 113 L Ed 2d 719, 111 S Ct 1621.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 919 F2d 906.

No. 90-1353. Michael Swepston, et al., Petitioners v Clark Davenport Snell, et al.

499 US 976, 113 L Ed 2d 719, 111 S Ct 1622.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 920 F2d 673.

No. 90-1354. E. W. Scripps Company, et al., Petitioners v Louis A. Ball

499 US 976, 113 L Ed 2d 719, 111 S Ct 1622.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Kentucky denied.

Same case below, 801 SW2d 684.

No. 90-1359. Charles Goodacre and Peter Grim, Petitioners v New York

499 US 976, 113 L Ed 2d 719, 111 S Ct 1622.

April 22, 1991. Petition for writ of certiorari to the Appellate Division, Supreme Court of New York, First Judicial Department, denied.

Same case below, 166 App Div 2d 264, 560 NYS2d 639.

No. 90-1366. Wallace International Silversmiths, Inc., Petitioner v Godinger Silver Art Co., Inc.

499 US 976, 113 L Ed 2d 720, 111 S Ct 1622.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 916 F2d 76.

No. 90-1367. Kaiser Cement Corporation, Petitioner v Lake Asbestos of Quebec, Ltd., et al.

No. 90-1368. W. R. Grace & Co., et al., Petitioners v Barnwell School District No. 45, et al.

No. 90-1378. United States Gypsum Company, et al., Petitioners v Barnwell School District No. 45, et al.; and United States Gypsum Co., et al. Petitioners v School District of Lancaster, et al.

499 US 976, 113 L Ed 2d 720, 111 S Ct 1622.

April 22, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same cases below, 921 F2d 1330 (first case); 921 F2d 1338 (second case); 921 F2d 1310 (third case); 921 F2d 1330 (fourth case).

No. 90-1373. City of Albuquerque, et al., Petitioners v Joseph N. Riggs, III, et al.

499 US 976, 113 L Ed 2d 720, 111 S Ct 1623.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 916 F2d 582.

No. 90-1376. St. John's Hospital, et al., Petitioners v Erica Henry, by her Mother and Next Friend, Jane Henry

499 US 976, 113 L Ed 2d 720, 111 S Ct 1623.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 138 Ill 2d 533, 563 NE2d 410.

No. 90-1377. Mary Catherine Halvorsen, Petitioner v Albert (Boyer) Halvorsen

499 US 976, 113 L Ed 2d 720, 111 S Ct 1623.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 90-1381. Michael Finnegan, Petitioner v Campeau Corp., et al.

499 US 976, 113 L Ed 2d 721, 111 S Ct 1624.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 915 F2d 824.

No. 90-1387. Serbian Eastern Orthodox Diocese for the United States and Canada, et al., Petitioners v St. Sava Mission Corporation

499 US 977, 113 L Ed 2d 721, 111 S Ct 1624.

April 22, 1991. Petition for writ of certiorari to the Court of Appeal of California, Third Appellate District, denied.

Same case below, 223 Cal App 3d 1354, 273 Cal Rptr 340.

No. 90-1404. Jonathan C. Scott, Petitioner v Estate of Jennie Mandel Barnett, et al.

499 US 977, 113 L Ed 2d 721, 111 S Ct 1624.

April 22, 1991. Petition for writ of certiorari to the Court of Appeals of Ohio, Franklin County, denied.

No. 90-1411. Freddie D. Bibbs and Jimmie Drew Lockhart, Sr., Petitioners v Matanuska-Susitna Borough, Inc., et al.

499 US 977, 113 L Ed 2d 721, 111 S Ct 1624, reh den (US) 116 L Ed 2d 274, 112 S Ct 334.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Alaska denied.

No. 90-1452. Lear Siegler, Inc., Petitioner v Randall Scott Kirby

499 US 977, 113 L Ed 2d 721, 111 S Ct 1624.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 923 F2d 858.

No. 90-1455. City of Bridge City, Texas, Petitioner v City of Port Arthur, Texas, et al.

499 US 977, 113 L Ed 2d 721, 111 S Ct 1624.

April 22, 1991. Petition for writ of certiorari to the Court of Appeals of Texas, Ninth District, denied.

Same case below, 792 SW2d 217.

No. 90-1459. Curtis L. Wrenn, Petitioner v Secretary, Department of Veterans Affairs, et al.

499 US 977, 113 L Ed 2d 721, 111 S Ct 1625.

April 22, 1991. Petition for writ of certiorari to the United States Court

of Appeals for the Second Circuit denied.

Same case below, 918 F2d 1073.

No. 90-1481. Rafael Sanchez and Edwin Sanchez, Petitioners v United States

499 US 977, 113 L Ed 2d 722, 111 S Ct 1625.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 917 F2d 607.

No. 90-1495. George Cameron, Elrader Browning, Jr., Gregory Washington, James Holiday, Petitioners v United States

499 US 977, 113 L Ed 2d 722, 111 S Ct 1625.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same cases below, 909 F2d 1489 and 909 F2d 1490.

No. 90-5987. Lexie Little Carter, Petitioner v United States

499 US 977, 113 L Ed 2d 722, 111 S Ct 1625.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 914 F2d 245.

No. 90-6471. Alfredo Villegas, Petitioner v United States

499 US 977, 113 L Ed 2d 722, 111 S Ct 1625.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 911 F2d 623.

No. 90-6508. Jose Torres-Garcia, Petitioner v United States

499 US 977, 113 L Ed 2d 722, 111 S Ct 1626.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 905 F2d 1541.

No. 90-6559. Anthony L. Austin, Petitioner v United States

499 US 977, 113 L Ed 2d 722, 111 S Ct 1626.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 363.

No. 90-6562. Armando Rafael Febles, Petitioner v United States

499 US 977, 113 L Ed 2d 723, 111 S Ct 1626.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 911 F2d 727.

No. 90-6609. Hector Orlando Cruz-Rosario, Petitioner v United States

499 US 977, 113 L Ed 2d 723, 111 S Ct 1626.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 914 F2d 20.

No. 90-6610. James Cantu Sanchez, Petitioner v United States

499 US 978, 113 L Ed 2d 723, 111 S Ct 1626.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 914 F2d 1355.

No. 90-6705. Arlester Scott, Petitioner v Jimmie M. Jones, Superintendent, Missouri Training Center for Men, et al.

499 US 978, 113 L Ed 2d 723, 111 S Ct 1626.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 915 F2d 1188.

No. 90-6756. Donald Sceifers, Petitioner v Jack R. Duckworth, Warden

499 US 978, 113 L Ed 2d 723, 111 S Ct 1627, reh den (US) 115 L Ed 2d 1011, 111 S Ct 2842.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

No. 90-6806. Seta Samuel Kovankian, Petitioner v United States

499 US 978, 113 L Ed 2d 723, 111 S Ct 1627.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 912 F2d 1469.

No. 90-6825. Jerik Parez, Petitioner v General Atomics, et al.

499 US 978, 113 L Ed 2d 724, 111 S Ct 1627.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 921 F2d 280.

No. 90-6839. John P. Laskaris, Petitioner v Pennsylvania

499 US 978, 113 L Ed 2d 724, 111 S Ct 1627.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Western District, denied.

Same case below, 525 Pa 663, 583 A2d 792.

No. 90-6896. JV-108162, Petitioner v Arizona

499 US 978, 113 L Ed 2d 724, 111 S Ct 1627.

April 22, 1991. Petition for writ of certiorari to the Court of Appeals of Arizona, Division One, denied.

No. 90-6899. Ronald D. Walker, Petitioner v United States

499 US 978, 113 L Ed 2d 724, 111 S Ct 1628.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-6901. Millard Lee Smith, Petitioner v United States

No. 90-7013. Riley Harrington Keller III, Petitioner v United States

499 US 978, 113 L Ed 2d 724, 111 S Ct 1628.

April 22, 1991. Petitions for writs of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same cases below, 916 F2d 628.

No. 90-6907. Steven Carter, Petitioner v United States

499 US 978, 113 L Ed 2d 724, 111 S Ct 1628.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 910 F2d 1524.

No. 90-6984. Joe Williams, Petitioner v United States

499 US 978, 113 L Ed 2d 724, 111 S Ct 1628.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 916 F2d 720.

No. 90-7048. Luis Aldama Sanchez, Petitioner v United States

499 US 978, 113 L Ed 2d 725, 111 S Ct 1628.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 917 F2d 558.

No. 90-7065. Torrence Tillman, Petitioner v Allen J. Sharp, Chief Judge, United States District Court, Northern District of Indiana

499 US 978, 113 L Ed 2d 725, 111 S Ct 1629.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 922 F2d 843.

No. 90-7120. Rosa M. Pope, Petitioner v Department of the Army

499 US 978, 113 L Ed 2d 725, 111 S Ct 1629, reh den (US) 115 L Ed 2d 1012, 111 S Ct 2843.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit denied.

Same case below, 923 F2d 870.

No. 90-7140. Joseph Silverburg, Petitioner v Suzanne Cordery, et al.

499 US 978, 113 L Ed 2d 725, 111 S Ct 1629.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 90-7152. Jesus Pinto Velasquez, Petitioner v United States

499 US 979, 113 L Ed 2d 725, 111 S Ct 1629.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 918 F2d 175.

No. 90-7214. Edison Jordan, Petitioner v United States

499 US 979, 113 L Ed 2d 725, 111 S Ct 1629.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 915 F2d 622.

No. 90-7219. Jackson Williams, Petitioner v West Virginia

499 US 979, 113 L Ed 2d 725, 111 S Ct 1629.

April 22, 1991. Petition for writ of

certiorari to the Circuit Court of Greenbrier County, West Virginia, denied.

No. 90-7232. Charles Edward Dean, Petitioner v Stephen Kaiser, Warden, et al.

499 US 979, 113 L Ed 2d 726, 111 S Ct 1630.

April 22, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied.

No. 90-7233. Jack E. Fleming, Petitioner v Colorado

499 US 979, 113 L Ed 2d 726, 111 S Ct 1630, reh den (US) 114 L Ed 2d 730, 111 S Ct 2279.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Colorado denied.

No. 90-7243. James R. Betts, Petitioner v Allied Cementing Company, Inc., et al.; and James R. Betts, Petitioner v Agri Tech Services, Inc.

499 US 979, 113 L Ed 2d 726, 111 S Ct 1630.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-7245. Emmaline Williams, Petitioner v Illinois

499 US 979, 113 L Ed 2d 726, 111 S Ct 1630.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Illinois denied.

Same case below, 139 Ill 2d 1, 563 NE2d 431.

No. 90-7248. Felix H. Olim, Petitioner v United States

499 US 979, 113 L Ed 2d 726, 111 S Ct 1630.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

No. 90-7249. Larry Cooper, Petitioner v Mel Hess, et al.

499 US 979, 113 L Ed 2d 726, 111 S Ct 1630.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 917 F2d 568.

No. 90-7252. James Richard Terrovona, Petitioner v Lawrence Kincheloe, Warden

499 US 979, 113 L Ed 2d 726, 111 S Ct 1631.

April 22, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 912 F2d 1176.

No. 90-7253. Juan Serna and Sergio Serna, Petitioners v Illinois

499 US 979, 113 L Ed 2d 727, 111 S Ct 1631.

April 22, 1991. Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

Same case below, 196 Ill App 3d 1103, 582 NE2d 772.

No. 90-7254. Gary Eugene Kukes, Petitioner v Michael Ramsey, et al.

499 US 979, 113 L Ed 2d 727, 111 S Ct 1631.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-7256. John T. Scheltzer, Petitioner v Workers' Compensation Board of California, et al.

499 US 979, 113 L Ed 2d 727, 111 S Ct 1631.

April 22, 1991. Petition for writ of certiorari to the Court of Appeal of California, Fifth Appellate District, denied.

No. 90-7268. Charles Correll, Petitioner v United States, et al.

499 US 979, 113 L Ed 2d 727, 111 S Ct 1631.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

No. 90-7281. Rolly O. Kinnell, Petitioner v Robert H. Miller, Chief Justice, Supreme Court of Kansas, et al.

499 US 979, 113 L Ed 2d 727, 111 S Ct 1631.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

No. 90-7292. Robert A. Cumber, Petitioner v New Jersey

499 US 980, 113 L Ed 2d 727, 111 S Ct 1632.

April 22, 1991. Petition for writ of certiorari to the Superior Court of New Jersey, Appellate Division, denied.

No. 90-7330. Bennie M. Brown, et al., Petitioners v United States

499 US 980, 113 L Ed 2d 727, 111 S Ct 1632.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 915 F2d 1573.

No. 90-7333. Rajesh Thakkar, Petitioner v Dickinson Debevoise

499 US 980, 113 L Ed 2d 728, 111 S Ct 1632, reh den (US) 114 L Ed 2d 730, 111 S Ct 2279.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 925 F2d 420.

No. 90-7349. Robie Louis Scott, Petitioner v Anthony M. Frank, Postmaster General

499 US 980, 113 L Ed 2d 728, 111 S Ct 1632.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

Same case below, 938 F2d 189.

No. 90-7355. John Zervas, Petitioner v Donald B. Rice, Secretary of the Air Force

499 US 980, 113 L Ed 2d 728, 111 S Ct 1632.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 287 US App DC 379, 923 F2d 202.

No. 90-7361. Francis E. Harrison, Petitioner v Howard Beyer, Administrator, New Jersey State Prison, et al.

499 US 980, 113 L Ed 2d 728, 111 S Ct 1632.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 135.

No. 90-7376. Roberto Mieres-Borges, Petitioner v United States

499 US 980, 113 L Ed 2d 728, 111 S Ct 1633.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 919 F2d 652.

No. 90-7380. Stephen DiGregorio, Petitioner v United States

499 US 980, 113 L Ed 2d 728, 111 S Ct 1633.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 137.

No. 90-7390. Donald Melvin Myers, Petitioner v Phoebe B. Johnson, Warden, et al.

499 US 980, 113 L Ed 2d 729, 111 S Ct 1633.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 920 F2d 927.

No. 90-7401. William T. Frye, Petitioner v United States

499 US 980, 113 L Ed 2d 729, 111 S Ct 1633.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 920 F2d 934.

No. 90-7406. Anthony Tyrone Anderson, Petitioner v United States

499 US 980, 113 L Ed 2d 729, 111 S Ct 1633.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 923 F2d 450.

No. 90-7412. Gregory Catchings, Petitioner v United States

499 US 980, 113 L Ed 2d 729, 111 S Ct 1633.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 922 F2d 777.

No. 90-7415. Joseph M. Curtis, Petitioner v United States

499 US 980, 113 L Ed 2d 729, 111 S Ct 1634.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 921 F2d 281.

No. 90-7417. Ng Wah, Petitioner v United States

499 US 980, 113 L Ed 2d 729, 111 S Ct 1634.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Same case below, 287 US App DC 245, 920 F2d 1039.

No. 90-7420. Milton Keith James, Petitioner v United States

499 US 981, 113 L Ed 2d 729, 111 S Ct 1634.

April 22, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 911 F2d 725.

No. 90-7423. Roger D. Mosby, Petitioner v C. Wayne Matthews

499 US 981, 113 L Ed 2d 730, 111 S Ct 1634.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

No. 90-7433. Henry Edsel Holmes, Petitioner v United States

499 US 981, 113 L Ed 2d 730, 111 S Ct 1634.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 920 F2d 12.

No. 90-7434. Bridgett Ray Tate, Petitioner v United States

499 US 981, 113 L Ed 2d 730, 111 S Ct 1634.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 921 F2d 282.

No. 90-7437. Antonio E. Bascaro, Petitioner v United States

499 US 981, 113 L Ed 2d 730, 111 S Ct 1635.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 922 F2d 830.

No. 90-7445. Joe E. Fryar, Petitioner v United States

499 US 981, 113 L Ed 2d 730, 111 S Ct 1635.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 920 F2d 252.

No. 90-7448. Isiah Evans, III, Petitioner v Gary L. Henman, Warden

499 US 981, 113 L Ed 2d 730, 111 S Ct 1635.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 925 F2d 1468.

No. 90-7451. George Azar, Petitioner v United States

499 US 981, 113 L Ed 2d 731, 111 S Ct 1635.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 732.

No. 90-7454. Michael Nelson, Petitioner v United States

499 US 981, 113 L Ed 2d 731, 111 S Ct 1635.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 922 F2d 311.

No. 90-7455. Leroy Kelly, Petitioner v Connecticut

499 US 981, 113 L Ed 2d 731, 111 S Ct 1635.

April 22, 1991. Petition for writ of certiorari to the Appellate Court of Connecticut denied.

Same case below, 23 Conn App 160, 580 A2d 520.

No. 90-7459. Jose Francier Ochoa, Petitioner v United States

499 US 981, 113 L Ed 2d 731, 111 S Ct 1636.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 921 F2d 284.

No. 90-7466. William Wollman and Lorella Wollman, Petitioners v United States

499 US 981, 113 L Ed 2d 731, 111 S Ct 1636.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 912 F2d 1468.

No. 90-7468. Rosa Savinovich, Petitioner v United States

499 US 981, 113 L Ed 2d 731, 111 S Ct 1636.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 919 F2d 147.

No. 90-7475. Kevin Neville Bunn, Petitioner v United States

499 US 981, 113 L Ed 2d 731, 111 S Ct 1636.

April 22, 1991. Petition for writ of

certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 923 F2d 863.

No. 90-7479. Horrace Ruddock, Petitioner v United States

499 US 981, 113 L Ed 2d 732, 111 S Ct 1636.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 922 F2d 834.

No. 90-7481. John Carl Webber, Petitioner v United States

499 US 981, 113 L Ed 2d 732, 111 S Ct 1636.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 925 F2d 1472.

No. 90-7482. Bruce Howard Rogat, et ux., Petitioners v United States

499 US 982, 113 L Ed 2d 732, 111 S Ct 1637.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 924 F2d 983.

No. 90-7487. Arthur Snead, Petitioner v United States

499 US 982, 113 L Ed 2d 732, 111 S Ct 1637.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 919 F2d 733.

No. 90-7492. Oscar Estupinan-Paredes, Petitioner v United States

499 US 982, 113 L Ed 2d 732, 111 S Ct 1637.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied.

Same case below, 918 F2d 979.

No. 90-7505. Patricia Toppi, aka Patricia Fiske, Petitioner v United States

499 US 982, 113 L Ed 2d 732, 111 S Ct 1637.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Same case below, 920 F2d 11.

No. 90-7511. Lorenzo Gonzalez, Petitioner v United States

499 US 982, 113 L Ed 2d 733, 111 S Ct 1637.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 918 F2d 1129.

No. 90-7514. Johnny Williams, Petitioner v United States

499 US 982, 113 L Ed 2d 733, 111 S Ct 1637.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Same case below, 922 F2d 578.

No. 90-7521. Edward Henderson, Petitioner v United States

499 US 982, 113 L Ed 2d 733, 111 S Ct 1638.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 928 F2d 397.

No. 90-7533. Chester Shepard, Petitioner v Gene Borgert, Warden

499 US 982, 113 L Ed 2d 733, 111 S Ct 1638.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Same case below, 925 F2d 1465.

No. 88-1037. Arizona, Petitioner v Daniel E. Nastro, Judge, Superior Court of Arizona, County of Maricopa

499 US 982, 113 L Ed 2d 733, 111 S Ct 1638.

April 22, 1991. The motion of respondent Elden Gardner for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Same case below, 157 Ariz 541, 760 P2d 541.

No. 88-6833. Larry Eugene Moon, Petitioner v Georgia

499 US 982, 113 L Ed 2d 733, 111 S Ct 1638, reh den (US) 115 L Ed 2d 1010, 111 S Ct 2841.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Georgia denied.

Same case below, 258 Ga 748, 375 SE2d 442.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances

cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7093. Charles Edward Moore, Petitioner v California

499 US 982, 113 L Ed 2d 734, 111 S Ct 1638, reh den (US) 115 L Ed 2d 990, 111 S Ct 2818.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of California denied.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7155. Herbert R. Bassette, Petitioner v Charles L. Thompson, Warden

499 US 982, 113 L Ed 2d 734, 111 S Ct 1639.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

Same case below, 915 F2d 932.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-7411. Ted Calvin Cole, Petitioner v Texas

499 US 982, 113 L Ed 2d 734, 111 S Ct 1639.

April 22, 1991. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 795 SW2d 207.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90-273. Commissioner of Revenue of Tennessee, Petitioner v Newsweek, Inc.; and Commissioner of Revenue of Tennessee, Petitioner v Southern Living, Inc., et al.

499 US 983, 113 L Ed 2d 734, 111 S Ct 1639, reh den (US) 115 L Ed 2d 990, 111 S Ct 2817.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of

Tennessee, Middle Division, denied. Justice Blackmun would grant certiorari.

Same case below, 789 SW2d 247 (first case) and 789 SW2d 251 (second case).

No. 90-1118. Hearst Corporation, Petitioner v Iowa Department of Revenue and Finance

499 US 983, 113 L Ed 2d 735, 111 S Ct 1639.

April 22, 1991. Petition for writ of certiorari to the Supreme Court of Iowa denied. Justice Blackmun would grant certiorari.

Same case below, 461 NW2d 295.

No. 90-1192. City of Lockport, New York, et al., Petitioners v United States

499 US 983, 113 L Ed 2d 735, 111 S Ct 1640.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. Justice White would grant certiorari.

Same case below, 916 F2d 890.

No. 90-1255. Nutrasweet Company, Petitioner v Stadt Corporation, et al.

499 US 983, 113 L Ed 2d 735, 111 S Ct 1640.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. Justice White would grant certiorari.

Same case below, 917 F2d 1024.

No. 90-1226. William Hope, Petitioner v United States

499 US 983, 113 L Ed 2d 735, 111 S Ct 1640, reh den (US) 115 L Ed 2d 1010, 111 S Ct 2841.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. Justice White and Justice Marshall would grant certiorari.

Same case below, 906 F2d 254.

No. 90-6595. Julian Seidel, Petitioner v United States

499 US 983, 113 L Ed 2d 735, 111 S Ct 1640.

April 22, 1991. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. Justice White and Justice Marshall would grant certiorari.

Same case below, 914 F2d 1493.

No. 90-6829. Jesus Gregorio Melendez, Petitioner v California

499 US 983, 113 L Ed 2d 735, 111 S Ct 1640.

April 22, 1991. Petition for writ of

certiorari to the Court of Appeal of California, Sixth Appellate District, denied. Justice White and Justice Marshall would grant certiorari.

No. 90-1338. Gulf States Utilities Company, Petitioner v Coalition of Cities for Affordable Utility Rates, et al.

499 US 983, 113 L Ed 2d 736, 111 S Ct 1641.

April 22, 1991. The motion of Edison Electric Institute for leave to file a brief as amicus curiae is granted. Petition for writ of certiorari to the Supreme Court of Texas denied.

Same case below, 798 SW2d 560.

No. 90-1398. Xerox Corporation, Petitioner v Peter N. Tolliver, et al.

499 US 983, 113 L Ed 2d 736, 111 S Ct 1641.

April 22, 1991. The motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Same case below, 918 F2d 1052.

No. 90-1405. Alabama, Petitioner v Joe Louis Harrell

499 US 984, 113 L Ed 2d 736, 111 S Ct 1641.

April 22, 1991. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the Court of Criminal Appeals of Alabama denied.

Same case below, 571 So 2d 1269.

No. 90-1425. Texas, Petitioner v Craig William Reeves

499 US 984, 113 L Ed 2d 736, 111 S Ct 1641.

April 22, 1991. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.

Same case below, 806 SW2d 540.

No. 90-7536. In Re Dorsey Dean Adams, Jr., Petitioner

499 US 974, 113 L Ed 2d 736, 111 S Ct 1641.

April 22, 1991. The petition for writ of habeas corpus is denied.

No. 90-6890. In Re Alfonso Albert Lopez, Petitioner

499 US 974, 113 L Ed 2d 736, 111 S Ct 1641.

April 22, 1991. The petition for writ of mandamus is denied.

No. 90-7128. In Re George Brown, Jr., Petitioner

499 US 974, 113 L Ed 2d 737, 111 S Ct 1642.

April 22, 1991. The petition for writ of mandamus is denied.

No. 90-7117. In Re Joseph Silverburg, Petitioner

499 US 974, 113 L Ed 2d 737, 111 S Ct 1642.

April 22, 1991. The petition for writ of mandamus and/or prohibition is denied.

No. 90-787. F. L. Farr, Petitioner v Federal Deposit Insurance Corporation, et al.

499 US 984, 113 L Ed 2d 737, 111 S Ct 1642.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1119, 112 L Ed 2d 1177, 111 S Ct 1071.

No. 90-1040. Juan Antonio Pena and Noe Santana, Petitioners v Texas

499 US 984, 113 L Ed 2d 737, 111 S Ct 1642.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1120, 112 L Ed 2d 1180, 111 S Ct 1074.

No. 90-1178. Johnny Oyola, Petitioner v United States

499 US 984, 113 L Ed 2d 737, 111 S Ct 1642.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1121, 112 L Ed 2d 1182, 111 S Ct 1076.

No. 90-6445. Charles Silagy, Petitioner v Howard Peters, III, Warden

499 US 984, 113 L Ed 2d 737, 111 S Ct 1642.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1110, 112 L Ed 2d 1106, 111 S Ct 1024.

No. 90-6578. Theodore Washington, Petitioner v Arizona

499 US 984, 113 L Ed 2d 737, 111 S Ct 1642.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1127, 112 L Ed 2d 1195, 111 S Ct 1091.

No. 90-6620. Roy A. Day, Petitioner v GAF Corporation, et al.

499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 924, 113 L Ed 2d 252, 111 S Ct 1319.

No. 90-6682. Walter Thomas, Petitioner v Illinois

499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1127, 112 L Ed 2d 1196, 111 S Ct 1092.

No. 90-6723. B. E. Sweatt, Petitioner v News World Communications, Inc.

499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1106, 112 L Ed 2d 1093, 111 S Ct 1011.

No. 90-6728. Michael Dixon, Petitioner v Jack R. Duckworth, Warden

499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 909, 113 L Ed 2d 222, 111 S Ct 1113.

No. 90-6742. Arnold D. Mackey, Petitioner v Marlene J. Mackey

499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 909, 113 L Ed 2d 222, 111 S Ct 1114.

No. 90-6791. Elmer Leon Peterson, Petitioner v Edward Grannis, et al.

499 US 984, 113 L Ed 2d 738, 111 S Ct 1643.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 925, 113 L Ed 2d 254, 111 S Ct 1321.

No. 90-6848. Roy A. Day, Petitioner v Rosemary Barkett, Justice, Florida Supreme Court, et al.

499 US 984, 113 L Ed 2d 738, 111 S Ct 1644.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 926, 113 L Ed 2d 257, 111 S Ct 1324.

No. 90-6872. Luis Tamayo-Cariballo, Petitioner v United States

499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 498 US 1125, 112 L Ed 2d 1191, 111 S Ct 1086.

No. 90-6877. Torrence Tillman, Petitioner v Jack Duckworth, et al.

499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 927, 113 L Ed 2d 258, 111 S Ct 1326.

No. 90-6891. In Re Sean W. Mason, Petitioner

499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 918, 113 L Ed 2d 271, 111 S Ct 1340.

No. 90-6909. James Edward Norris, Petitioner v Federal Bureau of Investigation

499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 910, 113 L Ed 2d 226, 111 S Ct 1117.

No. 90-6936. Wadress Hubert Metoyer, Jr., Petitioner v Stephen W. Kaiser, Warden, et al.

499 US 984, 113 L Ed 2d 739, 111 S Ct 1644.

April 22, 1991. The petition for rehearing is denied.

Former Decision, 499 US 928, 113 L Ed 2d 261, 111 S Ct 1329.

No. 87-746. Michael H. and Victoria D., Appellants v Gerald D.

499 US 984, 113 L Ed 2d 739, 111 S Ct 1645.

April 22, 1991. The motion of appellants for leave to file second petition for rehearing is denied. Justice Scalia and Justice Souter took no part in the consideration or decision of this motion.

Former Decision, 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333, reh den 492 US 937, 106 L Ed 2d 634, 110 S Ct 22.

No. 90-7785 (A-799). Roy Allen Harich, Petitioner v Richard L. Dugger, Secretary, Florida Department of Corrections

499 US 984, 113 L Ed 2d 739, 111 S Ct 1645.

April 23, 1991. The application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, is denied. The petition for writ of cer-

tiorari to the United States Court of Appeals for the Eleventh Circuit is denied.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 90-7789 (A-801). Roy Allen Harich, Petitioner v Florida

499 US 985, 113 L Ed 2d 740, 111 S Ct 1645.

April 23, 1991. The application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, is denied. The petition for a writ of certiorari to the Supreme Court of Florida is denied.

Same case below, 573 So 2d 303.

Justice Marshall, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

ANNOTATIONS AND BRIEFS

FOR CASES REPORTED IN THIS VOLUME

The annotations herein, prepared by the Editors, are indexed in the "Index to Decisions and Annotations" appearing at the end of this volume. For additional annotation references, consult appropriate topics and sections in the United States Supreme Court Digest, Lawyers' Edition, and consult the L Ed General Index to Decisions, Annotations, and Digest.

Selected summaries of briefs are by the publisher's staff.

UNITED STATES
SUPREME COURT REPORTS
LAWYERS' EDITION

ANNOTATIONS AND BRIEFS

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Petitioner

v

CLEOPATRA HASLIP et al.

Reported in this volume: p 1, supra.

Holding: Alabama punitive damages award against insurance company for alleged agent's fraud in lapse of health insurance held not to violate due process under Federal Constitution's Fourteenth Amendment.

BRIEFS AND APPEARANCES OF COUNSEL

Bruce A. Beckman, of Los Angeles, California, argued the cause and, with **Vicki W. W. Lai,** also of Los Angeles, California, and **J. Mark Hart, Ollie L. Blan, Jr.,** and **Bert S. Nettles,** all of Birmingham, Alabama, filed briefs for petitioner:

Alabama law, as here applied, and the punitive damages doctrine generally, violates due process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and without a necessary relationship to the amount of actual harm caused.

Alabama law violated Pacific Mutual's right to due process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a respondeat superior theory.

The amount of the award of punitive damages in this case was excessive, in violation of Pacific Mutual's due process right to be free of grossly excessive, disproportionate damages awards.

The suit below, although nominally civil, must be considered criminal in nature as to the punitive damages awarded therein, entitling Pacific Mutual to protection under the Fifth and Fourteenth Amendments to the United States Constitution.

The constitutional defects in the award of punitive damages against Pacific Mutual in this case were not cured by judicial review and the potential for a remittitur.

Bruce J. Ennis, Jr., of Washington, D.C., argued the cause and, with **Donald B. Verrilli, Jr., Theresa A. Chmara,** and **Cynthia A. Misicka,** all also of Washington, D.C., **Charles E. Sharp, John F. Whitaker,** and

Robert H. Adams, all of Birmingham, Alabama, and **Andrew T. Citrin,** of Mobile, Alabama, filed a brief for respondents:

The due process clause does not prohibit vicarious liability for punitive damages resulting from the fraudulent conduct of an agent acting with apparent authority and within the scope of his employment.

The punitive damage award was the product of fair, rational, and reliable procedures that satisfy all requirements of due process.

The size of this award does not violate any substantive requirement of due process because it is rationally related to Alabama's goals of deterrence and retribution, and thus cannot be found "wholly arbitrary and unreasonable."

Victor A. Kovner, Leonard J. Koerner, Pamela Sieder Doglow, and **John Hogrogian** filed a brief for the city of New York as amicus curiae urging reversal; **Erwin N. Griswold, Patricia A. Dunn, Laurie W. Finneran, Deena B. Jenab, Kenneth H. Nails, James H. Bradner, Jr., Richard E. Goodman, Mary N. Belgrade, Richard E. Barnsback, Phillip E. Stano, Michael Lovendusky, Joe W. Peel, Theresa L. Sorota, Patrick J. McNally,** and **John J. Nangle** filed a brief for the Alliance of American Insurers, et al. as amici curiae urging reversal; **Rex E. Lee, Carter G. Phillips, Loreen M. Marcil, Benjamin W. Heineman, Jr., Philip A. Lacovara, Martin F. Conner,** and **Thomas Schmidt** filed a brief for the American Institute of Architects, et al. as amici curiae urging reversal; **Loenard P. Novello, Jon N. Ekdahl, Harris J. Amhowitz, Howard J. Kronsgard, Carl D. Liggio,** and **Eldon Olson** filed a brief for Arthur Andersen & Co., et al. as amici curiae urging reversal; **Ellis J. Horvitz, S. Thomas Toss,** and **Fred J. Hiestand** filed a brief for the Association for California Tort Reform as amicus curiae urging reversal; **Andrew L. Frey, Kenneth S. Geller, Mark I. Levy,** and **Andrew J. Pincus** filed a brief for the Business Roundtable, et al. as amici curiae urging reversal; **Martin S. Kaufman** filed a brief for Bethlehem Steel Corporation, et al. as amici curiae urging reversal; **John D. Adlock, Laura S. Wertheimer, J. Theodore Gentry, Peter C. Coleman,** and **Edmund K. John** filed a brief for the Center for Claims Resolution as amicus curiae urging reversal; **Malcolm E. Wheler, Stephen A. Bokat, Jan S. Amundson, David F. Zoll,** and **Nancy Nord** filed a brief for the Chamber of Commerce of the United States, et al. as amici curiae urging reversal; **John Calvin Jeffries, Jr., George Clemon Freeman, Jr.,** and **Archie S. Robinson** filed a brief for the Defense Research Institute as amicus curiae urging reversal; **Robert E. Williams, Douglas S. McDowell,** and **Ann Elizabeth Reesman** filed a brief for the Equal Employment Advisory Council as amicus curiae urging reversal; **Harold N. Hill, Jr., E. Clayton Scofield, III, Meade Burns,** and **Milton B. Satcher** filed a brief for the Hospital Authority of Gwinnett County, Georgia as amicus curiae urging reversal; **Thomas P. Kane, Ross F. Plaetzer,** and **Donald V. Jernberg** filed a brief for Liability Insurance Underwriters as amicus curiae urging reversal; **Richard F. Kingham, Bruce N. Kuhlik, Bruce J. Brennan, Edwin C. Mulcahy, Loretta E. Chi, Kirk B. Johnson,** and **Martin F. Hatlie** filed a brief for the Pharmaceutical Manufacturers Association as amicus curiae urging reversal; **Robert L. Barr, Jr., G. Stephen Parker,** and **Robert B.**

Baker, Jr. filed a brief for Southeastern Legal Foundation, Inc. as amicus curiae urging reversal; **Daniel J. Popeo** and **Richard A. Samp** filed a brief for the Washington Legal Foundation, et al. as amici curiae urging reversal; **Theodore B. Olson, Lary L. Simms, Arthur A. Palmunen, John B. Reiniers, Robert R. Shehan, John H. Rehm, Jr.,** and **George R. Rehm** filed a brief for Aetna Life Insurance Company, et al. as amici curiae urging reversal; **Davis Carr** and **H. E. Nix, Jr.** filed a brief for the Alabama Defense Lawyers Association as amicus curiae urging reversal; **P. Cameron DeVore, Marshall J. Nelson, Donald S. Kunze, Davis Wright Temaine, Douglas P. Jacobs, Steven Sadicario, Richard J. Tofel, Victor F. Ganzi, Robert J. Hawley, John C. Fontaine, Sandra S. Baron, Constance S. Baron, Constance A. Heymann, Harry M. Johnston, III, David D. Hiller, James L. Arnold. Barbara Percival, Martin P. Messinger, Mark H. Charles, Richard M. Schmidt, Jr., B. Bruce Rich, Tina A. Ravitz, Harry L. Baumann, Steven A. Bookshester, Jane E. Kirtley, Bruce W. Sanford,** and **J. Laurent Scharff** filed a brief for CBS Inc., et al. as amici curiae urging reversal; **Eric M. Lieberman** and **Michael Lee Hertzberg** filed a brief for Church of Scientology in California as amicus curiae urging reversal; **Martha A. Churchill** filed a brief for Mid-America Legal Foundation as amicus curiae urging reversal; **Forrest S. Latta** and **Geoffrey C. Hazard, Jr.** filed a brief for the National Association of Mutual Insurance Companies as amicus curiae urging reversal; **Victor E. Schwartz, Clifton S. Elgarten, Liberty Magarian, Scott L. Winkelman, Howard Green,** and **James T. McIntyre** filed a brief for the National Association of Wholesaler-Distributors, et al. as amici curiae urging reversal; and **Michael J. Woodruff** and **Forest D. Montgomery** filed a brief for the National Council of Churches of Christ in the U.S.A., et al. as amici curiae urging reversal.

Don Siegelman, Attorney General of Alabama, and **George E. Jones, III,** Assistant Attorney General, and the following attorneys for their respective jurisdictions filed a brief for the state of Alabama, et al. as amici curiae urging affirmance: **John K. Van de Kamp,** Attorney General of California, **Michael J. Strumwasser,** Special Assistant Attorney General, and **Jim Mattox,** Attorney General of Texas; **Jeffrey Robert White** and **Russ M. Herman** filed a brief for Association of Trial Lawyers of America as amicus curiae urging affirmance; **Roland Wrinkle** filed a brief for California Trial Lawyers Association as amicus curiae urging affirmance; **Andrew F. Popper** and **Linda Lipsen** filed a brief for Consumers Union of the United States as amicus curiae urging affirmance; **Michael V. Ciresi, Roberta B. Walburn,** and **Pricilla Budeira** filed a brief for Trial Lawyers for Public Justice as amicus curiae urging affirmance; **John W. Haley** and **Bruce J. McKee** filed a brief for the Alabama Trial Lawyers Association as amicus curiae urging affirmance; and **Roger O'Sullivan** and **Mark Stachon** filed a brief for National Insurance Consumer Organization as amicus curiae urging affirmance.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, Petitioner

v

JOSEPH E. O'NEILL et al.

Reported in this volume: p 51, supra.

Holding: Union's agreement to settle strike held, under circumstances presented, not arbitrary or discriminatory and thus not breach of union's duty of fair representation.

BRIEFS AND APPEARANCES OF COUNSEL

Laurence Gold, of Washington, D.C., argued the cause and, with **David Silberman** and **Gary Green,** both also of Washington, D.C., **Harold G. Levison, Jed S. Rakoff, Michael C. Harwood,** and **Mudge Rose Guthrie,** all of New York City, and **John A. Irvine,** of Houston, Texas, filed briefs for petitioner:

The duty of fair representation does not authorize judges or juries to scrutinize the rationality of a union's good-faith judgment to settle a union dispute.

The decision of the Air Line Pilots Association (ALPA) to enter into the settlement agreement with Continental was entirely rational.

Marty Harper, of Phoenix, Arizona, argued the cause and, with **John P. Frank, Allen R. Clarke,** and **Janet Napolitano,** all also of Phoenix, Arizona, filed a brief for respondents:

ALPA's conduct in secretly settling against the strike must be measured against the duty of fair representation standard set forth in Vaca v Sipes [386 US 171, 17 L Ed 2d 842, 87 S Ct 903].

Whether ALPA breached its duty of fair representation in this case cannot be resolved on summary judgment; it is a question for the trier of fact.

The settlement impermissibly discriminates between strikers and strikebreakers solely because the strikers engaged in concerted activity.

Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Stuart M. Gerson,** Deputy Solicitor General **David L. Shapiro,** and **James A. Feldman** filed a brief for the United States as amicus curiae urging reversal; and **John J. Gallagher, Charles L. Warren, Joel M. Cohn,** and **Jon A. Geier** filed a brief for Continental Airlines, Inc. as amicus curiae urging reversal.

WEST VIRGINIA UNIVERSITY HOSPITALS, INC., Petitioner

v

ROBERT CASEY, Governor of Pennsylvania, et al.

Reported in this volume: p 68, supra.

Holding: Fees for services rendered by experts in civil rights litigation held not properly shifted to losing party under 42 USCS § 1988.

BRIEFS AND APPEARANCES OF COUNSEL

Robert T. Adams, of Richmond, Virginia, argued the cause and, with

Thomas J. Stallings, also of Richmond, Virginia, **Julia Krebs-Markrich,** of Washington, D.C., and **Jack M. Stover,** of Harrisburg, Pennsylvania, filed briefs for petitioner:

Experts' fees must be compensable under 42 USC § 1988 [42 USCS § 1988] in order to achieve Congress' goal of encouraging private enforcement of the civil rights statutes.

This court has already held that 42 USC § 1988's [42 USCS § 1988's] proper interpretation may not be limited to its "plain" language.

Crawford Fitting Co. v J. T. Gibbons, Inc. [482 US 437, 96 L Ed 2d 385, 107 S Ct 2494] does not control fee awards under 42 USC § 1988 [42 USCS § 1988].

Calvin R. Koons, Senior Deputy Attorney General of Pennsylvania, of Harrisburg, Pennsylvania, argued the cause and, with **Ernest D. Preate, Jr.,** Attorney General, **Jerome T. Foerster,** Deputy Attorney General, and **John G. Knorr, III,** Chief Deputy Attorney General, all also of Harrisburg, Pennsylvania, filed a brief for respondents:

The plain statutory language, interpreted in Crawford, limits expert witness fees to 30 dollars per day.

Congress did not intend witness fees to be covered by 42 USC § 1988 [42 USCS § 1988].

Missouri v Jenkins [491 US 274, 105 L Ed 2d 229, 109 S Ct 2463] does not support the petitioner.

David S. Tatel, Robert F. Mullen, Norman Redlich, Barbara R. Arnwine, Robert B. McDuff, Steven R. Shapiro, Harvey Grossman, Sidney S. Rosdeitcher, Steven Fasman, Antonia Hernandez, E. Richard Larson, Ruben Franco, and **Arthur A. Baer** filed a brief for the Lawyers' Committee for Civil Rights Under Law, et al. as amici curiae urging reversal.

Robert E. Williams, Douglas S. McDowell, and **Garen E. Dodge** filed a brief for the Equal Employment Advisory Council as amicus curiae urging affirmance.

NORFOLK AND WESTERN RAILWAY COMPANY, et al., Petitioners

v

AMERICAN TRAIN DISPATCHERS ASSOCIATION et al. (No. 89-1027)

CSX TRANSPORTATION, INC., Petitioner

v

BROTHERHOOD OF RAILWAY CARMEN et al. (No. 89-1028)

Reported in this volume: p 95, supra.

Holding: 49 USCS § 11341(a) held to exempt rail carriers from obligations under collective bargaining agreements as necessary to effect consolidations approved by Interstate Commerce Commission.

BRIEFS AND APPEARANCES OF COUNSEL

Jeffrey S. Berlin, of Washington, D.C., argued the cause in both cases and, with **Mark E. Martin,** also of Washington, D.C., and **William P. Stallsmith, Jr.,** of Norfolk, Virginia, filed briefs for petitioners in No. 98-1027:

The Interstate Commerce Act, 49 USC § 11341(a) [49 USCS § 11341(a)], exempts a railroad carrying out an ICC-approved transaction from the assertion against it of rights claimed under labor agreements enforceable through the Railway Labor Act.

James S. Whitehead, of Chicago, Illinois, and **Nicholas S. Yavanovic** and **James D. Tomola,** both of Jacksonville, Florida, filed briefs for petitioner in No. 89-1028:

The Court of Appeals' decision, interpreting the Interstate Commerce Act (ICA) immunity provisions, is contrary to prior decisions of this court.

The plain terms of § 11341(a) immunize rail carriers from obligations in collective bargaining agreements that impede an ICC-approved rail consolidation.

The legislative history of the ICA's immunity provisions establishes that Congress intended to encompass obligations arising from rail collective bargaining agreements.

The Court of Appeals' decision will frustrate the achievement of the national transportation policy of fostering and encouraging rail consolidations.

Jeffrey S. Minear, of the Department of Justice, Washington, D.C., argued the cause and, with Acting Solicitor General **John G. Roberts, Jr.,** Deputy Solicitor General **David. L. Shapiro,** and **Lawrence S. Robbins,** all also of the Department of Justice, Washington, D.C., and **Robert S. Burk, Henri F. Rush,** and **John J. McCarthy, Jr.,** all of the Interstate Commerce Commission, Washington, D.C., filed a brief for the federal respondents in support of petitioners in both cases under Supreme Court Rule 12.4:

Under 49 USC 11341(a) [49 USCS § 11341(a)], a party that has entered into a merger approved by the Commission is exempt from any legal obligation imposed by a collective bargaining agreement, to the extent such an exemption is necessary to implement the merger.

William G. Mahoney, of Washington, D.C., argued the cause and, with **John O'B. Clarke, Jr.,** also of Washington, D.C., filed a brief for the union respondents in both cases:

The holding of the Court of Appeals that § 11341(a) does not empower the ICC to override collective bargaining agreements in consolidations resulting from a merger or control is correct and should be affirmed.

Section 11341(a) does not authorize the Commission to override collective bargaining agreements.

An interpretation of § 11341(a) as relieving a rail carrier of its obligations to employees under its collective bargaining agreements would be contrary to the Fifth Amendment to the Constitution of the United States.

Richard T. Conway, Ralph J. Moore, Jr., D. Eugenia Langan, and **David P. Lee** filed a brief for the National Railway Labor Conference as amicus curiae urging reversal.

LYNN MARTIN, Secretary of Labor, Petitioner

v

OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION et al.

Reported in this volume: p 117, supra.

Holding: With respect to ambiguous Occupational Safety and Health Act regulation, reviewing court held required to defer to reasonable interpretation of Secretary of Labor rather than that of OSHRC.

BRIEFS AND APPEARANCES OF COUNSEL

Clifford M. Sloan, of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr** and Deputy Solicitor General **David L. Shapiro,** both also of the Department of Justice, Washington, D.C., and **Robert P. Davis, Allen H. Feldman,** and **Mark S. Flynn,** all of the Department of Labor, Washington, D.C., filed briefs for petitioner:

The Secretary's interpretation of an Occupational Safety and Health Act regulation is entitled to judicial deference.

John D. Faught, of Englewood, Colorado, argued the cause and, with **Randy L. Sego** and **Michael W. Coriden,** both also of Englewood, Colorado, filed a brief for respondents:

The Tenth Circuit Court of Appeals properly held that deference is owed to the Commission's reasonable interpretation of an ambiguous regulatory standard.

The judgment of the Tenth Circuit properly affirmed the reasonable interpretation of the Commission, especially given that the Secretary's interpretation of the regulatory standards was unreasonable.

A judicially created rule of deference to the Secretary under all circumstances would undermine the purpose and function of the Commission and should not be adopted by this court.

George H. Cohen, Jeremiah A. Collins, and **Laurence Gold** filed a brief for the American Federation of Labor and Congress of Industrial Organizations as amicus curiae urging reversal.

Robert C. Gombar, Glen D. Nager, Steven T. Catlett, Deena B. Jenab, and **Earl R. Ohman, Jr.** filed a brief for the Occupational Safety and Health Review Commission as amicus curiae urging affirmance; **Albert J. Beveridge, III, Christopher W. Mahoney, Diane L. Gildersleeve,** and **Barton C. Green** filed a brief for American Iron and Steel Institute as amicus curiae urging affirmance; **Stephen A. Bokat, Robin S. Conrad,** and

Mona C. Zeiberg filed a brief for the Chamber of Commerce of the United States of America, et al. as amici curiae urging affirmance; and **W. Scott Railton, Brooke Bashore-Smith, Jan S. Amundson, Quentin Riegel, William H. Crabtree,** and **Thomas R. Merlino** filed a brief for the National Association of Manufacturers, et al. as amici curiae urging affirmance.

UNITED STATES, et al., Petitioners

v

MARCUS S. SMITH et al.

Reported in this volume: p 134, supra.

Holding: Federal Employees Liability Reform and Tort Compensation Act of 1988 held to preclude person injured abroad by United States military physician from seeking damages from such physician.

BRIEFS AND APPEARANCES OF COUNSEL

Deputy Solicitor General **David L. Shapiro,** of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Stuart M. Gerson, Stephen L. Nightingale, Barbara L. Herwig,** and **John F. Daly,** all also of the Department of Justice, Washington, D.C., filed briefs for the petitioners:

Under the Reform Act, the exclusive remedy for all claims arising from torts committed by federal employees acting within the scope of their employment, except for claims arising from violations of the Constitution or a federal statute, is a suit against the United States under the Federal Tort Claims Act.

The Gonzalez Act does not foreclose the application of the Reform Act to this case.

Walter A. Oleniewski, of Rockville, Maryland, argued the cause and, with **Ashley Joel Gardner,** also of Rockville, Maryland, filed a brief for respondents:

The Court of Appeals did not err in reversing the District Court order which substituted the Untied States as defendant and dismissed the Smiths' action against Dr. Marshall.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al., Petitioners

v

JOHNSON CONTROLS, INC.

Reported in this volume: p 158, supra.

Holding: Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.) held to bar employer from excluding fertile females from jobs entailing risk of harm to fetuses which females might conceive.

BRIEFS AND APPEARANCES OF COUNSEL

Marsha S. Berzon, of San Francisco, California, argued the cause and, with **Jordan Rossen** and **Ralph O. Jones,** both of Detroit, Michigan, **Carin Ann Clauss,** of Madison, Wisconsin, and **Laurence Gold,** of Washington, D.C., filed briefs for petitioners:

Johnson Controls' fetal protection policy constitutes facial discrimination on the basis of sex.

Johnson Controls' fetal protection policy cannot be justified as a bona fide occupational qualification within the meaning of § 703(e) of Title VII.

Stanley S. Jaspan, of Milwaukee, Wisconsin, argued the cause and, with **Susan R. Maisa, Anita M. Sorensen,** and **John P. Kennedy,** all also of Milwaukee, Wisconsin, and **Charles G. Curtis, Jr.,** of Madison, Wisconsin, filed a brief for respondent:

Title VII allows an employer to adopt a gender-drawn fetal protection policy in certain narrow circumstances.

Solicitor General **Kenneth W. Starr,** Assistant Attorney General **John R. Dunne,** Deputy Solicitor General **John G. Roberts, Jr.,** Deputy Assistant Attorney General **Roger Clegg, Clifford M. Sloan, David K. Flynn, Susan D. Carle, Charles A. Shanor, Gwendolyn Young Reams, Lorrain C. Davis,** and **Carolyn L. Wheeler** filed a brief for the United States as amicus curiae urging reversal; **John Van De Camp,** Attorney General of California, **Andrea Sheridan Ordin,** Chief Assistant Attorney General, **Marian M. Johnston,** Supervising Assistant Attorney General, and **Manuel M. Medeiros,** Deputy Attorney General, filed a brief for the state of California, et al. as amici curiae urging reversal; **James M. Shannon,** Attorney General of Massachusetts, and **Jennifer Wriggins, Marjorie Heins,** and **Judith E. Beals,** Assistant Attorneys General, and the following attorneys for their respective jurisdictions filed a brief for the state of Massachusetts, et al. as amici curiae urging reversal: **Robert K. Corbin,** Attorney General of Arizona, **Clarine Nardi Riddle,** Attorney General of Connecticut, **Charles M. Oberly, III,** Attorney General of Delaware, **Robert A. Butterworth,** Attorney General of Florida, **William J. Guste, Jr.,** Attorney General of Louisiana, **James E. Tierney,** Attorney General of Maine, **Frank J. Kelley,** Attorney General of Michigan, **Hubert H. Humphrey, III,** Attorney General of Minnesota, **Robert M. Spire,** Attorney General of Nebraska, **Robert J. Del Tufo,** Attorney General of New Jersey, **Robert Abrams,** Attorney General of New York, **Anthony J. Celebrezze, Jr.,** Attorney General of Ohio, **Robert H. Henry,** Attorney General of Oklahoma, **Hector Rivera-Cruz,** Attorney General of Puerto Rico, **Jim Mattox,** Attorney General of Texas, **Jeffrey L. Amestoy,** Attorney General of Vermont, **Godfrey R. De Castro,** Attorney General of the Virgin Islands, and **Kenneth O. Eikenberry,** Attorney General of Washington; **Joan E.**

Bertin, Elisabeth A. Werby, Jacqueline A. Berrien, Isabelle Katz Pinzler, Kary L. Moss, and **Marla Hassner** filed a brief for the American Civil Liberties Union, et al. as amici curiae urging reversal; **Nadine Taub** and **Suzanne L. Mager** filed a brief for the American Public Health Association, et al. as amici curiae urging reversal; **Susan Deller Ross, Naomi R. Cahn,** and **Robin Markush** filed a brief for Equal Rights Advocates, et al. as amici curiae urging reversal; **Julius LeVonne Chambers, Charles Stephen Ralston, Ronald L. Ellis, Marianne Engleman Lado,** and **Charlotte Rutherford** filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as amici curiae urging reversal; **Arthur H. Bryant** and **Lucinda M. Finley** filed a brief for Trial Lawyers for Public Justice as amicus curiae urging reversal; **Sidney S. Rosdeitcher, Sara L. Mandelbaum, Sheldon Oliensis, Jane Booth, Evelyn Cohn, Janet Gallagher, Janice Hoodman, Arthur Leonard,** and **Jim Williams** filed a brief for the Association of the Bar of the city of New York, et al. as amici curiae urging reversal; and **Thomas O. McGarity** and **Albert H. Meyerhoff** filed a brief for Natural Resources Defense Council, Inc. as amicus curiae urging reversal.

Timothy B. Dyk, Willis J. Goldsmith, David A. Copus, Stephen A. Bokat, Robin S. Conrad, and **Mona C. Zeiberg** filed a brief for the Chamber of Commerce of the United States of America as amicus curiae urging affirmance; **Jane E. Hadro, Jordan W. Lorence, Cimron Campbell, Mark N. Troobnick,** and **Wendell R. Bird** filed a brief for Concerned Women for America as amicus curiae urging affirmance; **Robert E. Williams, Douglas S. McDowell, Jan S. Amundson, Quentin Riegel,** and **Garen E. Dodge** filed a brief for the Equal Employment Advisory Council, et al. as amici curiae urging affirmance; **Jack Levy** and **Ilise Levy Feitshans** filed a brief for the Industrial Hygiene Law Project as amicus curiae urging affirmance; **James D. Holzhauer** and **Danuta Bembenista Panich** filed a brief for the National Safe Workplace Institute as amicus curiae urging affirmance; **Mark E. Chopko, John A. Liekweg,** and **Helen M. Alvare** filed a brief for the United States Catholic Conference as amicus curiae urging affirmance; **Daniel J. Popeo, Paul D. Kamenar,** and **John C. Scully** filed a brief for the Washington Legal Foundation as amicus curiae urging affirmance; and **Ronald A. Zumbrun, Anthony T. Caso,** and **Stephen S. Ostrach** filed a brief for Pacific Legal Foundation, et al. as amici curiae urging affirmance.

SALVE REGINA COLLEGE, Petitioner

v

SHARON L. RUSSELL

Reported in this volume: p 190, supra.

Holding: Federal Courts of Appeals held required to review de novo Federal District Courts' determinations of state law.

BRIEFS AND APPEARANCES OF COUNSEL

Steven E. Snow, of Providence, Rhode Island, argued the cause and filed briefs for petitioner:

The rule of deference applied by the Court of Appeals is unsupported in law and logic; fairness mandates de novo review of a district judge's determination of state law.

A de novo review by a circuit Court of Appeals of a federal district judge's determination of state law is mandated by the Erie Doctrine.

Edward T. Hogan of East Providence, Rhode Island, argued the cause and, with **Thomas S. Hogan,** also of East Providence, Rhode Island, filed a brief for respondent:

Prior to Matter of McLinn (1984, CA9) 739 F2d 1395 (en banc), Circuit Courts of Appeals recognized the "predictive" nature of a Federal District Court's determination of what a state supreme court might at a later date hold state law to be, as to questions unsettled at the time the District Court acted.

Recognizing this "predictive" element, Circuit Courts of Appeals historically gave deference to a District Court's determination, although the standard of deference was expressed in various ways.

Matter of McLinn, supra, at least on a superficial reading, imports into our jurisprudence a new standard for appellate review of such District Court rulings; i.e., a de novo or plenary review with no deference accorded to the lower tribunal's "prediction."

Stephen M. Shapiro, Mark I. Levy, James D. Holzhauer, Arthur R. Miller, and **John M. Thomas** filed a brief for the Ford Motor Company as amicus curiae urging affirmance.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner

v

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY (No. 89-1838)

ALI BOURESLAN, Petitioner

v

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY (No. 89-1845)

Reported in this volume: p 274, supra.

Holding: Title VII of Civil Rights Act of 1964 held not to apply extraterritorially to regulate employment practices of United States employers who employ United States citizens abroad.

BRIEFS AND APPEARANCES OF COUNSEL

Solicitor General **Kenneth W. Starr,** of the Department of Justice, Washington, D.C., argued the cause in both cases and, with Assistant Attorney General **John R. Dunne,** Deputy Solicitor General **John G. Roberts, Jr.,** and **Stephen L. Nightingale,** all also of the Department of Justice, Washington, D.C., and **Donald R. Livingston, Gwendolyn Young Reams, Vincent J. Blackwood,** and **Samuel A. Marcosson,** all of the Equal Employment Opportunity Commission, Washington, D.C., filed briefs for petitioner in No. 89-1838:

Title VII manifests a clear congressional intention to prohibit discrimination outside the United States by American employers against American citizens.

Concern for potential conflicts with the laws of other nations does not warrant limiting Title VII to discrimination within the United States.

Michael A. Maness and **Gerald M. Birnberg,** both of Houston, Texas, filed briefs for petitioner in No. 89-1845:

Title VII's longstanding national employment policy extends to all American employers of all United States citizens anywhere in the world, subject to qualifications likewise applicable to domestic employment.

Congress necessarily must have intended to condemn under Title VII invidiously discriminatory employment practices, formulated within this country but implemented outside the nation's borders, against citizens residing within the United States but traveling temporarily abroad.

Paul L. Friedman, of Washington, D.C., argued the cause and, with **Thomas J. O'Sullivan** and **Anne D. Smith,** both also of Washington, D.C., and **John D. Roady, V. Scott Kneese,** and **Gregory B. Richards,** all of Houston, Texas, filed a brief for respondents in both cases:

Congress did not intend to extend Title VII to workplaces overseas to regulate the practices of a U.S. employer of a U.S. citizen in a foreign country.

The EEOC's current interpretation of Title VII is entitled to no deference because it is neither supported by the statute, contemporaneous with enactment of Title VII, nor consistent with prior positions taken by the agency.

Sound policy reasons support the judgment of the courts below that Title VII should not be applied to overseas workplaces unless Congress clearly indicates that it should.

Jane M. Picker, Kenneth J. Kowalski, Sidney Picker, Jr., Isabelle Katz Pinzler, and **John A. Powell** filed a brief for the American Civil Liberties Union, et al. as amici curiae urging reversal; **Robert Plotkin, Michelle D. Bernard, Jacqueline F. Brown, Conan Louis, William Scott Shackelford, Steven M. Schneebaum,** and **Janelle M. Diller** filed a brief for the International Human Rights Law Group as amicus curiae urging reversal; **Gary B. Born, W. Hardy Callcott, Michael C. Small, Elizabeth Kiingi, Robert F. Mullen, David S. Tatel, Norman Redlich, Barbara R. Arnwine, Thomas J. Henderson,** and **Richard T. Seymour** filed a brief for the Lawyers' Committee for Civil Rights Under Law as amicus curiae urging reversal; and **Julius LeVonne Chambers, Charles Stephen Ralston,** and **Pamela S. Karlan** filed a brief for NAACP Legal Defense and Education Fund, Inc., et al. as amici curiae urging reversal.

Robert E. Williams, Douglas S. McDowell, and **Edward E. Potter** filed a brief for the Equal Employment Advisory Council as amicus curiae urging affirmance; **Cecil J. Olmstead, Edward J. Krauland,** and **Nancy B. Zucker** filed a brief for the Rule of Law Committee, et al. as amici curiae urging affirmance; **Kenneth Kirschner, John E. Parauda,** and **Lawrence Z. Lorber** filed a brief for the Society for Human Resources Management as amicus curiae urging affirmance; and **Jeffrey I. Zuckerman, Daniel J.**

Popeo, and **Paul D. Kamenar** filed a brief for the Washington Legal Foundation as amicus curiae urging affirmance.

ARIZONA, Petitioner

v

ORESTE C. FULMINANTE

Reported in this volume: p 302, supra.

Holding: Defendant's confession to informant in prison held coerced; admission of confession at Arizona capital murder trial held subject to harmless-error analysis, but not harmless under circumstances.

Annotation: p 757, infra.

BRIEFS AND APPEARANCES OF COUNSEL

Barbara M. Jarrett Senior Assistant Attorney General of Arizona, of Phoenix, Arizona, argued the cause and, with **Robert K. Corbin,** Attorney General, and **Jessica Gifford Funkhouser,** both also of Phoenix, Arizona, filed briefs for petitioner:

Fulminante's confession to an inmate informant was voluntary, and its admission in evidence did not violate the Fifth and Fourteenth Amendments.

There are no valid reasons to exempt the admission of a coerced confession from a harmless-error analysis.

Paul J. Larkin, of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Edward S. G. Dennis, Jr.,** Deputy Solicitor General **William C. Bryson,** and **Joel M. Gershowitz,** all also of the Department of Justice, Washington, D.C., filed a brief for the United States as amicus curiae urging reversal:

The respondent's confession was properly admitted at trial.

The erroneous admission of an involuntary confession should not call for automatic reversal of a conviction, without regard to whether the error may be harmless.

Stare decisis considerations do not preclude reconsideration of the rules adopted in Bram v United States (1897) 168 US 532, 42 L Ed 568, 18 S Ct 183.

Stephen R. Collins, of Phoenix, Arizona, by appointment of the court, 495 US 902, 109 L Ed 2d 284, 110 S Ct 2583, argued the cause and filed a brief for respondent:

Fulminante's confession was improperly admitted at trial as it was the product of extreme coercion.

Admission of a coerced confession is not subject to harmless error analysis.

Gregory U. Evans, Daniel B. Hales, Joseph A. Morris, George D.

Webster, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt, Bernard J. Farber, and **James P. Manak** filed a brief for Americans for Effective Law Enforcement, Inc., et al. as amici curiae urging reversal.

H. Gerald Beaver and **Richard B. Glazier** filed a brief for the National Association of Criminal Defense Lawyers as amicus curiae urging affirmance.

ANNOTATION

PREJUDICIAL EFFECT OF ADMITTING AT CRIMINAL TRIAL EVIDENCE OF CONFESSION OR OTHER SELF-INCRIMINATING STATEMENT OBTAINED FROM ACCUSED IN VIOLATION OF FEDERAL CONSTITUTION—SUPREME COURT CASES

by

Daniel A. Klein, J.D.

§ 1. Introduction
[a] Scope
[b] Related matters
§ 2. Background, summary, and comment
[a] Generally
[b] Practice pointers
§ 3. Applicability of harmless-error analysis to admission of self-incriminating statement obtained in violation of Federal Constitution
§ 4. Admission of unconstitutionally obtained statements as prejudicial or harmless error in particular cases
[a] Coerced or involuntary statements
[b] Statements obtained in violation of right to counsel

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

5 Am Jur 2d, Appeal and Error §§ 777-779, 791, 798-807; 32 Am Jur 2d, Federal Practice and Procedure §§ 370, 371, 377, 383

Annotations: See the related matters listed in the annotation, infra.

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:1275-22:1277, 22:1280-22:1282

20 Am Jur Trials 1, Federal Habeas Corpus Practice § 28

USCS, Constitution, Amendments 5, 6, 14

L Ed Digest, Appeal §§ 1437, 1438, 1562, 1563

L Ed Index, Confessions; Duress or Coercion; Harmless or Prejudicial Error

ALR Index, Confessions and Admissions; Duress and Coercion; Harmless and Prejudicial Error

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

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§ 1. Introduction

[a] Scope

This annotation[1] collects and analyzes the cases in which the United States Supreme Court has determined whether the admission, at a criminal trial, of a confession or other self-incriminating statement obtained from the accused in violation of the Federal Constitution[2] is subject to harmless-error analysis, and whether the admission of such a statement is prejudicial error or harmless error under given circumstances.[3]

For the purposes of this annotation, a statement is obtained unconstitutionally if the statement (1) is coerced, in violation of the accused's right against self-incrimination under the Fifth Amendment or due process rights under the Fourteenth Amendment;[4] (2) is otherwise involuntary under the Fifth Amendment enforcement guidelines of Miranda v Arizona (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11; or (3) is obtained after indictment in violation of the ac-

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1. The present annotation supersedes § 4 of the annotation at 31 L Ed 2d 921, and also § 11 of the annotation at 1 L Ed 2d 1735, § 7 of the annotation at 4 L Ed 2d 1833, § 7 of the annotation at 12 L Ed 2d 1340, § 7 of the annotation at 16 L Ed 2d 1294, and § 7 of the annotation at 22 L Ed 2d 872.

2. In the cases included in this annotation, the Supreme Court holds or assumes that the statements in question should have been excluded at trial.

3. Being limited to cases involving the prejudicial effect of admitting an accused's confession or other self-incriminating statement, this annotation does not discuss the prejudicial effect of admitting an invalid guilty plea (see § 9 of the annotation at 31 L Ed 2d 921), or evidence obtained through an unreasonable search or seizure in violation of the Fourth Amendment (see 31 L Ed 2d 921 § 5).

4. The Fifth Amendment provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself." The Fourteenth Amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." The Fourteenth Amendment's due process clause guarantees to an accused in a state court the protection of the Fifth Amendment's privilege against self-incrimination (see 16A Am Jur 2d, Constitutional Law § 454).

cused's Sixth Amendment right to counsel.[5]

[b] Related matters

Federal constitutional right to confront witnesses—Supreme Court cases. 98 L Ed 2d 1115.

Supreme Court's application of rule of Bruton v United States (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, holding that accused's rights under confrontation clause of Federal Constitution's Sixth Amendment are violated where codefendant's statement inculpating accused is admitted at joint trial. 95 L Ed 2d 892.

Supreme Court's views as to prejudicial effect in criminal case of erroneous instructions to jury involving burden of proof or presumptions. 92 L Ed 2d 862.

Supreme Court's views as to what constitute harmless errors or plain errors, under Rule 52 of Federal Rules of Criminal Procedure. 84 L Ed 2d 876.

The progeny of Miranda v Arizona in the Supreme Court. 46 L Ed 2d 903.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L Ed 2d 921.

Admissibility of pretrial confession in criminal case—Supreme Court cases. 1 L Ed 2d 1735, 4 L Ed 2d 1833, 12 L Ed 2d 1340, 16 L Ed 2d 1294, 22 L Ed 2d 872.

Error in evidentiary ruling in federal civil case as harmless or prejudicial under Rule 103(a) of Federal Rules of Evidence. 84 ALR Fed 28.

Violation of federal constitutional rule (Mapp v Ohio) excluding evidence obtained through unreasonable search or seizure as constituting reversible or harmless error. 30 ALR3d 128.

Violation of federal constitutional rule (Griffin v California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

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Stacy and Dayton, Rethinking Harmless Constitutional Error. 88 Colum L Rev 79 (January 1988).

◆

Antieau, Modern Constitutional Law.

Cook, Constitutional Rights of the Accused.

§ 2. Background, summary, and comment

[a] Generally

As a general rule, a judgment in a criminal case will not be set aside, on appeal, by reason of error unless the error is prejudicial to the accused; in other words, a criminal conviction will not be reversed for harmless or merely technical errors.[6] The United States Supreme Court has applied this principle to federal constitutional errors and has held that an error involving the denial of a federal constitutional right may generally be deemed harmless if the

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5. The Sixth Amendment provides, in pertinent part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This assistance of counsel clause is made obligatory upon the states by the Fourteenth Amendment's due process clause (see 16A Am Jur 2d, Constitutional Law § 454).

6. See 5 Am Jur 2d, Appeal and Error § 778.

court is satisfied beyond a reasonable doubt that the error did not contribute to the accused's conviction.[7] However, the Supreme Court has recognized that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.[8]

At one time, it appeared that the admission into evidence of a coerced or involuntary confession[9] was viewed by the Supreme Court as an infraction of one of these basic rights.[10] Thus, the Supreme Court frequently indicated that where a confession had been obtained from an accused involuntarily, in violation of the accused's federal constitutional rights, the admission of such a confession was automatically a ground for reversing the accused's conviction; in a number of cases, the Supreme Court said that this rule applied even if the conviction was adequately supported by evidence other than the confession.[11] However, the Supreme Court subsequently held that harmless-error analysis is applicable to the admission, in violation of an accused's federal constitutional rights, of an involuntary confession (§ 3, infra). In so holding, the court characterized this kind of constitutional error as a mere "trial error" in the presentation of evidence, as distinguished from other errors which constitute structural defects in the trial mechanism itself. Applying harmless-error analysis in the case at hand, however, the court held that it was not harmless error to admit an involuntary confession—despite the fact that a second, voluntary confession was also admitted—where (1) a successful prosecution depended on the jury believing the two confessions, (2) the jury's assessment of the second confession could easily have depended in large part on the presence of the first confession, (3) the admission of the first confession led to the admission of other evidence prejudicial to the accused, and (4) the presence of the first confession influenced the trial's sentencing phase (§ 4[a], infra).

Another type of constitutional error with respect to self-incriminating statements is the admission of such a statement where it has been obtained from an accused, in violation of the Sixth Amendment, in a postindictment interrogation in which the accused was not assisted by

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7. See Chapman v California (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, reh den 386 US 987, 18 L Ed 2d 241, 87 S Ct 1283.

8. Such infractions include (1) the total deprivation of the right to counsel at trial, (2) a judge's lack of impartiality, (3) the unlawful exclusion of members of the accused's race from a grand jury, (4) the denial of the right of self-representation at trial, and (5) the denial of a public trial. See Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067.

9. It is an established rule that an accused's confession that is shown not to have been freely and voluntarily made, but rather to have been induced by hope or promise of benefit, reward, or immunity—or by force, violence, fear, or threats—is not admissible in evidence against the accused, except to the extent that it may be used to impeach the accused's testimony. See 29 Am Jur 2d, Evidence § 529.

10. As late as 1988, it was observed that "all members of the Court appear to agree" that violations of the right against coerced confessions can never be considered harmless. See Stacy and Dayton, 88 Colum L Rev 79 (January 1988).

11. For a list of cases supporting this rule, see the footnote to the discussion of Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067, infra § 3. A commentator characterized this rule as "imperatively necessary"; see Antieau, Modern Constitutional Law § 5:82.

counsel.[12] The Supreme Court, although observing that government misconduct resulting in a violation of the Sixth Amendment may be at least as reprehensible as conduct that results in an involuntary confession, has indicated that the admission of statements obtained in violation of the Sixth Amendment is subject to harmless-error analysis (§ 3, infra). Applying such analysis, the court has held that any Sixth Amendment error in the admission of a particular confession was harmless beyond a reasonable doubt, where there was other, overwhelming evidence of the accused's guilt (§ 4[b], infra).

[b] Practice pointers

Whenever a self-incriminating, unconstitutionally obtained statement is introduced into evidence at a criminal trial, it would seem advisable for the defense counsel to make a timely objection and to move for the exclusion of the statement in order to preserve the issue for appeal, notwithstanding early Supreme Court decisions which indicated that the admission in evidence of an involuntary confession was so fundamental a constitutional error that the accused could not properly be considered to have waived the right to challenge, on appeal, the voluntariness of the confession and its admission in evidence.[13]

Where a trial court has denied an accused's pretrial motion to suppress an unconstitutionally obtained statement, and the accused chooses to plead "no contest" to the prosecution's case and forego a full trial, counsel for the accused may find it advisable not only to preserve the objection to the denial of the motion, but also to argue in an appeal or other postconviction proceeding that (1) the trial court's error cannot properly be deemed harmless, given that the accused has never had an opportunity to impeach the prosecution's other evidence or offer rebutting evidence, and (2) under such circumstances, the reviewing court need not engage in detailed harmless-error analysis but should merely decline to hold that the error was harmless beyond a reasonable doubt.[14]

An attorney seeking to show that the admission of an unconstitutionally obtained confession was harmless error should note that, even under the rule of Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067, infra § 3, a conviction will not be affirmed solely on a showing that the evidence other than the contested confession was sufficient to sustain the verdict. Rather, the question in constitutional harmless-error analysis is whether there was a reasonable possibility that the evidence complained of might have contributed to the conviction.[15] Thus, counsel for the prosecution may find it helpful to demonstrate, where possible, not only that the other evidence of guilt

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12. See 29 Am Jur 2d, Evidence § 556.

13. See § 4[c] of the annotation at 31 L Ed 2d 921 for a discussion of such decisions. Continued reliance on these decisions seems questionable in light of the Supreme Court's current view that the admission of unconstitutionally obtained confessions is subject to harmless-error analysis.

14. Such a situation was presented in Berkemer v McCarty (1984) 468 US 420, 82 L Ed 2d 317, 104 S Ct 3138, where the Supreme Court affirmed a judgment that reversed a denial of habeas corpus.

15. See Chapman v California (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, reh den 386 US 987, 18 L Ed 2d 241, 87 S Ct 1283, where the Supreme Court also said that the prosecution has the burden of showing that the error in question was harmless.

was "overwhelming,"[16] but also that (1) the jury's assessment of the admissible evidence did not depend on the presence of the accused's erroneously admitted statement, (2) the erroneously admitted statement was merely cumulative of the other evidence, (3) the erroneous admission of the statement did not open the door to allow the admission of other prejudicial evidence that otherwise would have been inadmissible, and (4) the presence of the statement did not influence the sentencing phase of the trial.[17]

§ 3. Applicability of harmless-error analysis to admission of self-incriminating statement obtained in violation of Federal Constitution

The Supreme Court has indicated that the admission of a confession or other self-incriminating statement that has been obtained in violation of the accused's federal constitutional rights is not necessarily prejudicial error, and that harmless-error analysis may properly be applied with respect to at least some categories of unconstitutionally obtained statements.

Thus, it was held in Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067, that the admission at a state criminal trial, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, of an accused's involuntary confession is subject to harmless-error analysis. The court said that the admission of involuntary confessions or statements belongs in the category of "trial error" —that is, error that occurs during the presentation of the case to the jury—as opposed to certain other constitutional violations, such as the total deprivation of the right to counsel or self-representation at trial, which violations are structural defects in the trial mechanism and thus defy analysis by harmless-error standards. The admission of an involuntary confession is not the type of error that can be said to transcend the criminal process, but rather is similar in magnitude and importance to the admission of an accused's statement in violation of the Sixth Amendment right to counsel, the court said. The court noted that it had held such a Sixth Amendment violation to be harmless error in Milton v Wainwright (1972) 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174, and the court reasoned that it was impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment. Although an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors, this circumstance is not a reason for eschewing the harmless-error test entirely, since a reviewing court may conclude that the admission of such a confession was not harmless error, the court said. Although the court acknowledged that in Chapman v California (1967) 386 US 18, 17 L Ed 2d 705, 87 S Ct 824, 24 ALR3d 1065, reh den 386 US 987, 18 L Ed 2d 241, 87 S Ct 1283, it was

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16. Such a finding was said to support a holding, in Milton v Wainwright (1972) 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174, infra § 4[b], that any Sixth Amendment error in the admission of an accused's confession was harmless beyond a reasonable doubt.

17. These factors were among those considered by the court in Arizona v Fulminante, supra, where it was held that the admission of the accused's involuntary confession was not harmless beyond a reasonable doubt.

stated that "prior cases" had indicated that the admission of a coerced confession could never be treated as harmless error, the court said that this statement was to be regarded as a historical reference rather than the adoption of a rule. Also, the court said that the approach which had previously been rejected was not harmless-error analysis, but rather a more lenient rule which would have allowed affirmance of a conviction if the evidence other than the involuntary confession were sufficient to sustain the verdict. Thus the court rejected the argument that the principle of stare decisis required the court to hold that harmless-error analysis was inapplicable to the admission of involuntary confessions. Accordingly, the court (1) applied harmless-error analysis with respect to an accused's coerced confession of murder, and (2) affirming a decision which reversed the accused's conviction, held that the error was not harmless under the circumstances.

☆ OBSERVATION: Justices White, Marshall, Blackmun, and Stevens—dissenting from the holding in the Fulminante case, supra, that the admission of an accused's coerced confession is subject to harmless-error analysis—expressed the view that (1) a coerced confession is fundamentally different from the other types of erroneously admitted evidence to which harmless-error analysis has been applied, and (2) no convincing reason had been offered for overturning the Supreme Court's long line of decisions to the effect that the admission of a coerced confession vitiates a criminal conviction.[18] These four

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18. Among the decisions that supported such a view were Bram v United States (1897) 168 US 532, 42 L Ed 568, 18 S Ct 183; Lisenba v California (1941) 314 US 219, 86 L Ed 166, 62 S Ct 280, reh den 315 US 826, 86 L Ed 1222, 62 S Ct 620; Ward v Texas (1942) 316 US 547, 86 L Ed 1663, 62 S Ct 1139; Lee v Mississippi (1948) 332 US 742, 92 L Ed 330, 68 S Ct 300; Leyra v Denno (1954) 347 US 556, 98 L Ed 948, 74 S Ct 716, reh den 348 US 851, 99 L Ed 671, 75 S Ct 18; Fikes v Alabama (1957) 352 US 191, 1 L Ed 2d 246, 77 S Ct 281, reh den 352 US 1019, 1 L Ed 2d 561, 77 S Ct 553; Spano v New York (1959) 360 US 315, 3 L Ed 2d 1265, 79 S Ct 1202; Blackburn v Alabama (1960) 361 US 199, 4 L Ed 2d 242, 80 S Ct 274; Rogers v Richmond (1961) 365 US 534, 5 L Ed 2d 760, 81 S Ct 735; Haynes v Washington (1963) 373 US 503, 10 L Ed 2d 513, 83 S Ct 1336; Beecher v Alabama (1967) 389 US 35, 19 L Ed 2d 35, 88 S Ct 189; Brooks v Florida (1967) 389 US 413, 19 L Ed 2d 643, 88 S Ct 541. In addition, the following cases supported the view that the admission of a coerced confession requires reversal of a conviction even if the conviction is adequately supported by other evidence which has been properly admitted: Lyons v Oklahoma (1944) 322 US 596, 88 L Ed 1481, 64 S Ct 1208, reh den 323 US 809, 89 L Ed 645, 65 S Ct 26; Malinski v New York (1945) 324 US 401, 89 L Ed 1029, 65 S Ct 781; Kotteakos v United States (1946) 328 US 750, 90 L Ed 1557, 66 S Ct 1239; Haley v Ohio (1948) 332 US 596, 92 L Ed 224, 68 S Ct 302, 36 Ohio Ops 530; Stroble v California (1952) 343 US 181, 96 L Ed 872, 72 S Ct 599, 1 Media L R 1169, reh den 343 US 952, 96 L Ed 1353, 72 S Ct 1039; Brown v Allen (1953) 344 US 443, 97 L Ed 469, 73 S Ct 397, reh den 345 US 946, 97 L Ed 1370, 73 S Ct 827 and reh den 345 US 946, 97 L Ed 1370, 73 S Ct 827; Payne v Arkansas (1958) 356 US 560, 2 L Ed 2d 975, 78 S Ct 844; Culombe v Connecticut (1961) 367 US 568, 6 L Ed 2d 1037, 81 S Ct 1860; Lynumn v Illinois (1963) 372 US 528, 9 L Ed 2d 922, 83 S Ct 917; Jackson v Denno (1964) 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205; Miranda v Arizona (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974, reh den 385 US 890, 17 L Ed 2d 121, 87 S Ct 11; Rose v Clark (1986) 478 US 570, 92 L Ed 2d 460, 106 S Ct 3101. Thus, in Payne v Arkansas, supra, the court said that

Justices and Justice Kennedy constituted the majority for the holding that the admission of the particular confession at issue was not harmless error.

See Milton v Wainwright (1972) 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174, infra § 4[b], where, without entering into a discussion as to the applicability of harmless-error analysis to the admission of self-incriminating statements obtained in violation of the Sixth Amendment, the court applied such analysis and, accordingly, held that any Sixth Amendment error in the admission of a confession that had been obtained from the accused after his indictment, where the accused was not assisted by counsel, was harmless under the circumstances presented.

☆ OBSERVATION: In Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067, supra, the court described Milton v Wainwright, supra, as holding that the admission of an accused's statements obtained in violation of the Sixth Amendment "is subject to" harmless-error analysis.

See Berkemer v McCarty (1984) 468 US 420, 82 L Ed 2d 317, 104 S Ct 3138, involving the admission of an accused's postarrest statements that had been made without Miranda warnings, where the Supreme Court (1) declined to rule, under the circumstances presented, that the admission of such statements was harmless beyond a reasonable doubt, (2) noted that the case had arisen in a procedural posture that made the use of harmless-error analysis especially difficult, and (3) said that there was no need to decide whether harmless-error analysis was even applicable to such a case.

☆ COMMENT: In light of the subsequent holding in Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067, supra, that harmless-error analysis is applicable with respect to confessions obtained by coercion, it is arguable that (1) such analysis is also applicable with respect to confessions that are "involuntary" solely in the sense that they were obtained without Miranda warnings; and (2) the case of Orozco v Texas (1969) 394 US 324, 22 L Ed 2d 311, 89 S Ct 1095—in which the court, without discussing the issue of prejudicial effect or harmless error, reversed a conviction on the ground that the admission of testimony concerning statements which the accused had made when questioned in his home, without having been given the Miranda warnings, constituted a violation of the self-incrimination clause of the Fifth Amendment—does not support a view that the admis-

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the admission of a coerced confession vitiates the judgment even under such circumstances, because no one can say what credit and weight the jury gave to the confession. In one case, Stein v New York (1953) 346 US 156, 97 L Ed 1522, 73 S Ct 1077, reh den 346 US 842, 98 L Ed 362, 74 S Ct 13, it had been held that a criminal conviction could stand, despite the introduction of a coerced confession, if there was sufficient other evidence to sustain a finding of guilt and if the jury was instructed to determine whether the confession was voluntary and to ignore the confession unless it was found to be voluntary beyond a reasonable doubt. However, the Stein decision was expressly overruled by the court in Jackson v Denno, supra.

sion of a self-incriminatory statement obtained in violation of the Miranda guidelines is prejudicial per se.

§ 4. Admission of unconstitutionally obtained statements as prejudicial or harmless error in particular cases

[a] Coerced or involuntary statements

The Supreme Court has held, under particular circumstances, that it was not harmless error for a trial court to admit a self-incriminating statement obtained in such a manner as to be considered coerced or involuntary for purposes of the Fifth Amendment or the Fourteenth Amendment, even where other evidence of the accused's guilt was properly admitted.

Thus, in Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067, it was held that the admission of an accused's involuntary, pretrial murder confession was not harmless error beyond a reasonable doubt, despite the fact that a second, voluntary confession was also admitted, given that (1) a successful prosecution depended on the jury believing the two confessions, (2) the jury's assessment of the second confession could easily have depended in large part on the presence of the first confession, (3) the admission of the first confession led to the admission of other evidence prejudicial to the accused, and (4) the presence of the first confession influenced the trial's sentencing phase. While the accused was incarcerated for an unrelated crime, he confessed to a murder to a fellow inmate who was a paid informant for the Federal Bureau of Investigation and who had befriended the accused. After being released from prison, the accused allegedly gave his second confession to the informant's fiancee in the course of a casual conversation. The Supreme Court, having determined that the first confession was a product of coercion for purposes of the Fourteenth Amendment's due process clause, affirmed a decision that reversed the accused's conviction. In support of its conclusion that there was an insufficient showing of harmless error, the court noted that (1) the jurors could have believed that the two confessions reinforced and corroborated each other, so that one confession was not merely cumulative of the other; (2) the jurors could have believed, absent the admission of the first confession, that the fiancee had a motive to lie about the second confession; and (3) it was impossible to say beyond a reasonable doubt that the trial judge would have sentenced the accused to death absent the first confession.

☆ OBSERVATION: Three Justices, dissenting from the holding as to the harmlessness of the error in the Fulminante case, supra, expressed the view that the case was a "classic case" of harmless error, given that the second confession had been found to be free of any constitutional objection and had given more details of the crime than the first, involuntary confession had provided.

See Berkemer v McCarty (1984) 468 US 420, 82 L Ed 2d 317, 104 S Ct 3138, where the Supreme Court, affirming a judgment that reversed a denial of habeas corpus, declined to rule that a trial court's admission of an accused's postarrest statements that had been made without Miranda warnings was harmless beyond a reasonable doubt. Both before and after placing the accused under

arrest for a traffic misdemeanor, a highway police officer asked the accused, without giving the Miranda warnings, whether he had been using intoxicants. On both occasions the accused made incriminating statements that were subsequently admitted by the trial court, and the accused was convicted after pleading "no contest." The Supreme Court held that the trial court's refusal to suppress the statements was erroneous with respect to the postarrest statements but not erroneous with respect to the prearrest statements. Stating that there was no need to decide whether harmless-error analysis was applicable to such a case, the Supreme Court said that there were three cumulative reasons for declining to hold that the trial court's error was harmless: (1) the issue of harmless error had not been presented to any of the courts below; (2) the prearrest statements were not identical with the erroneously admitted postarrest statements; and (3) the case arose in a procedural posture that made the use of harmless error analysis especially difficult, given that the accused had never received a full trial.

See, however, Milton v Wainwright (1972) 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174, infra § 4[b], where (1) the accused contended that self-incriminating statements that he had made to a police officer were involuntary under Fifth Amendment standards and also were obtained in violation of his Sixth Amendment rights; (2) the Supreme Court granted certiorari on the accused's claims under the Fifth and Sixth Amendments; (3) the court assumed, for the sake of argument, that the statements should have been excluded; and (4) the court held that any error in the admission of the statements was harmless beyond a reasonable doubt, given that there had been other, overwhelming evidence of the accused's guilt.

☆ NOTE: Although the Milton case, supra, apparently involved a Fifth Amendment issue as well as a Sixth Amendment issue, the court in Arizona v Fulminante (1991, US) 113 L Ed 2d 302, 111 S Ct 1246, reh den (US) 114 L Ed 2d 472, 111 S Ct 2067, supra, referred to Milton only as a case involving the Sixth Amendment right to counsel.

[b] Statements obtained in violation of right to counsel

Under certain circumstances, the Supreme Court has held that it was harmless error for a trial court to admit a self-incriminating statement even if the statement had been obtained in violation of the accused's right to counsel under the Sixth Amendment.

Thus, in Milton v Wainwright (1972) 407 US 371, 33 L Ed 2d 1, 92 S Ct 2174, it was held that any Sixth Amendment error in the admission of a confession that had been obtained from the accused after his indictment was harmless beyond a reasonable doubt, given that there had been other, overwhelming evidence of the accused's guilt. Prior to his indictment for murder, the accused had made three full confessions of guilt. Subsequently, the accused secured the services of an attorney, who advised him not to engage in any further discussion of the case with anyone else. After the accused had been indicted, and while he was in jail awaiting trial, a police officer posing as a fellow prisoner elicited incriminating statements from the accused that were essentially the same as those given in the prior confessions. The accused's preindictment and postindictment

statements were admitted at trial, and the accused was convicted. The Supreme Court, affirming a judgment that upheld a denial of habeas corpus relief, said that the record left no reasonable doubt that the trial jury would have reached a guilty verdict without hearing the police officer's testimony, given that (1) the voluntariness, for Fifth Amendment purposes, of the three prior confessions had been established in proceedings below, and (2) other evidence, highly damaging to the accused in its totality, had been presented to the jury.

☆ OBSERVATION: Four dissenting Justices in the Milton case, supra, expressed the view that (1) the accused's postindictment statements had been obtained in violation of the rule of Massiah v United States (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199, that the Sixth Amendment guarantees the aid of counsel to an indicted defendant under interrogation by the police in an extrajudicial proceeding, and (2) given the absence of any finding of harmless error by the courts below, there was at least a reasonable doubt as to whether the introduction of the postindictment statements contributed to the jury's verdict.

UNITED STATES v GAUBERT
113 L Ed 2d 358

UNITED STATES, Petitioner

v

THOMAS M. GAUBERT

Reported in this volume: p 335, supra.

Holding: Discretionary function exception of Federal Tort Claims Act (28 USCS § 2680(a)) held to bar claims against federal agencies for negligent supervision of savings and loan operations.

BRIEFS AND APPEARANCES OF COUNSEL

Assistant Attorney General **Stuart M. Gerson,** of the Department of Justice, Washington, D.C., argued the cause and, with Acting Solicitor General **John G. Roberts, Jr.,** Deputy Solicitor General **David L. Shapiro, Paul J. Larkin, Anthony J. Steinmeyer,** and **John F. Daly,** all also of the Department of Justice, Washington, D.C., filed briefs for petitioner:

The challenged actions of the federal regulatory officials all fit within the discretionary function exception to the Federal Tort Claims Act.

Abbe David Lowell, of Washington, D.C., argued the cause and, with **Max Hathaway** and **Meredith G. Moore,** both also of Washington, D.C., filed a brief for respondent:

The negligent management of Independent American Savings Association's day-to-day operations falls outside the discretionary function exception.

Daniel J. Popeo and **Richard A. Samp** filed a brief for Washington Legal Foundation, et al. as amici curiae urging reversal.

FEIST PUBLICATIONS, INC., Petitioner

v

RURAL TELEPHONE SERVICE COMPANY, INC.

Reported in this volume: p 358, supra.

Holding: Alphabetical listings of names, accompanied by towns and telephone numbers, in telephone book white pages held not copyrightable; thus, nonconsensual copying of listings held not to infringe on copyright.

Annotation: p 771, infra.

BRIEFS AND APPEARANCES OF COUNSEL

Kyler Knobbe, of Cimarron, Kansas, argued the cause and filed briefs for petitioner:

Any copyright in a telephone directory as a whole does not extend to the white page listing facts (name, address, and telephone number) contained therein.

Pre-existing data may be copied from a copyrighted compilation pursuant to 17 USC § 103(b) [17 USCS § 103(b)].

Copyright does not preclude all copying from a copyrighted work, but rather protects only against substantial copying of original expression.

The "sweat of the brow" doctrine cannot be reconciled with the 1976 Act and was not adopted by or approved in any manner by the Act.

The additional arguments of RTSC and its amici concerning economic incentives and unidentified interests in other undisclosed compilations and databases are simply aimed at eliminating competition, not at determining intellectual copyright provisions.

James M. Caplinger, Jr., of Topeka, Kansas, argued the cause and filed a brief for respondent:

A compilation of names, address, and telephone numbers constitutes copyrightable subject matter.

The scope of copyright protection extends to the compilation of material in a directory.

Feist's substantial copying of Rural's directory for commercial purposes does not constitute fair use.

Theodore Case Whitehouse, David P. Murray, Wendy L. Kornreich, and **Carl L. Stine** filed a brief for Association of North American Directory Publishers, et al. as amici curiae urging reversal; **Richard D. Grauer, Kathleen McCree Lewis, Frank K. Zinn,** and **Lawrence J. Goffney, Jr.** filed a brief for the International Association of Cross Reference Directory Publishers as amicus curiae urging reversal; **Ian D. Volner** and **Lauren M. Bloom** filed a brief for the Third-Class Mail Association as amicus curiae urging reversal; **Robert L. Sherman** and **Lisa M. Gigliotti** filed a brief for Direct Marketing Association, Inc., as amicus curiae urging reversal; and **Jeremiah D. McAuliffe, Bernard A. Barken,** and **Eugene Gressman** filed a brief for Haines and Company, Inc. as amicus curiae urging reversal.

Michael K. Kellogg, Charles Rothfeld, Raymond F. Burke, Douglas J. Kirk, Thomas P. Hester, Lawrence E. Strickling, Harlan Sherwat, Richard W. Odgers, Margaret deB. Brown, James E. Ellis, Paul G. Lane, and **Gilbert E. Geldon** filed a brief for Ameritech, et al. as amici curiae urging affirmance; **Robert G. Sugarman, R. Bruce Rich,** and **Sabrina E. Silverberg** filed a brief for the Association of American Publishers, Inc. as amicus curiae urging affirmance; **Kirk K. Van Tine, Richard M. Cahill, Robert T. Orner, John A. Odozynski,** and **Edward R. Sublett** filed a brief for GTE Corporation as amicus curiae urging affirmance; **L. Marie Guillory** and **David Cosson** filed a brief for National Telephone Cooperative Association as amicus curiae urging affirmance; **Richard J. Rappaport, Keith P. Schoenberger,** and **Martin T. McCue** filed a brief for United States Telephone Association as amicus curiae urging affirmance; **Vance K. Opperman, James E. Schatz,** and **Bradley W. Anderson** filed a brief for West Publishing Company as amicus curiae urging affirmance; and **Anthony B. Askew, Robert E. Richards, Elizabeth C. Jacobs, Walter H. Alford,** and **Vincent L. Sgrosso** filed a brief for Bellsouth Corporation as amicus curiae urging affirmance.

Steven J. Metalitz, Angela Burnett, and **Ronald J. Palenski** filed a brief for the Information Industry Association, Inc., et al. as amici curiae.

ANNOTATION

SUPREME COURT'S VIEWS AS TO WHEN BOOKS OR OTHER WRITTEN OR PRINTED MATERIALS ARE COPYRIGHTABLE UNDER FEDERAL LAW

by

Gary Knapp, M.B.A., J.D.

I. Preliminary matters

§ 1. Introduction
[a] Scope
[b] Related matters

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

18 Am Jur 2d, Copyright and Literary Property §§ 1, 18-30, 33-60

Annotations: See the related matters listed in the annotation.

7A Federal Procedure, L Ed, Copyrights §§ 18:169, 18:170

6A Federal Procedural Forms, L Ed, Copyright §§ 17:91, 17:92

7 Am Jur Pl & Pr Forms (Rev), Copyright and Literary Property, Forms 41, 42

5A Am Jur Legal Forms 2d, Copyright and Literary and Artistic Property §§ 72:21-72:30

20 Am Jur Proof of Facts 727, Plagiarism in Works of Fiction; 38 Am Jur Proof of Facts 2d 333, Limited Publication of Artistic or Literary Property; 50 Am Jur Proof of Facts 2d 263, Damages for Copyright Infringement

9 Am Jur Trials 293, Copyright Infringement Litigation

USCS, Constitution, Art I, § 8, cl 8; 17 USCS §§ 101-105

L Ed Digest, Copyright and Literary Property §§ 3-9

L Ed Index, Cable Television; Copyright and Literary Property; Court Records; Directories; Engravers and Engraving; Newspapers and Periodicals; Telecommunications

ALR Index, Cable Television; Computers; Copyright and Literary Property; Directories; Music and Musicians; Newspapers and Periodicals; Pictures and Photographs; Sound Recordings; Telecommunications

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

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I. Preliminary matters

§ 1. Introduction

[a] Scope

This annotation collects and analyzes the cases in which the United States Supreme Court has discussed or determined whether a book or another written or printed work is copyrightable under federal law.[1]

[b] Related matters

Supreme Court's views as to what constitutes copyright infringement. 78 L Ed 2d 957.

Statutory copyright protection of

1. Being limited to the issue whether a written or printed work is federally copyrightable, this annotation does not include cases in which the Supreme Court, without discussing or determining whether such a work is federally copyrightable, has discussed or determined whether a federal copyright in the work was infringed. As to Supreme Court cases involving the issue of what constitutes copyright infringement, see the annotation at 78 L Ed 2d 957.

"works of art"—federal cases. 98 L Ed 644.

Measure of statutory damages to which copyright owner is entitled under 17 USCS § 504(c). 105 ALR Fed 345.

Measure of damages and profits to which copyright owner is entitled under 17 USCS § 504(b). 100 ALR Fed 258.

What constitutes a "compilation" subject to copyright protection—modern cases. 88 ALR Fed 151.

Copyright protection for private letters. 87 ALR Fed 871.

Copyright of dance or choreography. 85 ALR Fed 906.

Award of attorneys' fees under §§ 101 et seq. of Copyright Act. 17 USCS § 505—modern cases, 85 ALR Fed 434.

Copyrightability of sculptural works. 83 ALR Fed 845.

Standing to sue for copyright infringement under 17 USCS sec. 501(b). 82 ALR Fed 509.

Copyright protection of computer programs under federal copyright laws. 70 ALR Fed 176.

Copyrightability of video games. 66 ALR Fed 490.

Immoral or obscene materials as subject to copyright protection. 50 ALR Fed 805.

Fabric and dress designs as protected by copyright under Federal Copyright Act. 26 ALR Fed 408.

Copyright, under federal copyright laws, of forms, or form books. 8 ALR Fed 869.

Copyright, under Federal Copyright Act (17 USC §§ 1 et seq.), in advertising materials, catalogs, and price lists. 5 ALR Fed 625.

Maps or charts as protected by copyright under Federal Copyright Acts. 4 ALR Fed 466.

Copyright, under federal copyright laws, of architectural plans, drawings, or designs. 3 ALR Fed 793.

Literary property in lectures. 38 ALR3d 779.

Common-law copyright in the spoken word. 32 ALR3d 618.

◆

Boorstyn, Copyright Law.

[c] Constitutional provisions

Article I, § 8, clause 8 of the Constitution of the United States provides as follows:

Section 8
That Congress shall have Power . . .

Clause 8
To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

[d] Statutory provisions

Section 101 of the Copyright Act of 1976 (17 USCS § 101), as amended, provides as follows:

§ 101. Definitions
As used in this title [17 USCS §§ 101 et seq.], the following terms and their variant forms mean the following: . . .

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with

accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. . . .

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works. . . .

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed. . . .

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. . . .

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. . . .

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. . . .

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article". . . .

Section 102 of the Copyright Act of 1976 (17 USCS § 102), as amended, provides as follows:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title [17 USCS §§ 101 et seq.], in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, ei-

ther directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Section 103 of the Copyright Act of 1976 (17 USCS § 103) provides as follows:

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 [17 USCS § 102] includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

Section 105 of the Copyright Act of 1976 (17 USCS § 105) provides as follows:

§ 105. Subject matter of copyright: United States Government works

Copyright protection under this title [17 USCS §§ 101 et seq. is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

§ 2. Background, summary, and comment

[a] Generally

Under Article I, § 8, clause 8 of the Constitution of the United States, Congress has the power to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their writings.[2] Pursuant to this constitutional provision, Congress enacted the first federal copyright legislation in 1790 and most recently revised the federal copyright legislation by enacting the Copyright Act of 1976 (17 USCS §§ 101 et seq.).[3] The Supreme Court has determined that a federal copyright in an author's writings is not available under common law, but only under legislation enacted by Congress pursuant to the power granted to Congress, by the Federal Constitution's copyright clause, to secure to authors the exclusive right to their writings.[4]

In cases in which the Supreme Court of the United States has dis-

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2. In this annotation, Article I, § 8, clause 8 of the Constitution of the United States is generally referred to as the Federal Constitution's copyright clause.

3. 18 Am Jur 2d, Copyright and Literary Property §§ 1 and 2.

4. Wheaton v Peters (1834) 33 US 591, 8 L Ed 1055; Banks v Manchester (1888) 128 US 244, 32 L Ed 425, 9 S Ct 36; Holmes v Hurst (1899) 174 US 82, 43 L Ed 904, 19 S Ct 606; Mazer v Stein (1954) 347 US 201, 98 L Ed 630, 74 S Ct 460.

cussed or determined whether a book or another written or printed work was copyrightable under federal law, the court has discussed certain general factors that affect the availability of federal copyright protection for such materials. The court has held that in order to be copyrightable under federal law, written or printed materials must possess originality (§ 3[a], infra), and the court has indicated that, for purposes of federal copyright law, written or printed materials which, rather than being mechanically produced, contain the author's expression resulting from at least some minimal degree of the author's creativity or intellectual labor possess originality (§ 3[b], infra). Novelty is not, in the court's view, a necessary component of the required originality. In accordance with this view, the court has noted that, if two identical or substantially similar written or printed works are produced independently by different authors, each without knowledge of the other's work, each work, so long as it exhibits creativity on the part of the author, is entitled to federal copyright (§ 3[c], infra).

According to the Supreme Court, the protection available for written or printed materials under federal law is intended to encourage the production of literary works that will increase the harvest of knowledge and will be of lasting benefits to the world. The court has observed that the unavailability of federal copyright with respect to facts is designed to prevent the wasted effort that would result if an author could not rely on facts contained in the works of other authors (§ 4, infra). The court has also held that a federal copyright in a written or printed work was available only if the work had not been previously published (§ 5, infra).

The Supreme Court has made a number of determinations concerning whether, or under what circumstances, certain general categories of materials constitute written or printed materials that are entitled to federal copyright. The court has indicated that the term "writings" in the Constitution's copyright clause granting Congress the power to secure to authors the exclusive right to their writings is subject to liberal construction under which the term may be given an enlarged definition that authorizes Congress to protect any form of written or printed materials resulting from an author's creative or intellectual labor (§ 6, infra). The court has held that facts, even if they are contained in a written or printed work that is federally copyrightable as a whole, are not thenselves copyrightable under federal law, because facts do not manifest the creativity of the authors of the written or printed works in which the facts are contained. The court has commented that facts are not created by authors, but rather are public matters that are discovered by authors (§ 7, infra). Ideas that are contained in copyrightable or uncopyrightable written or printed materials also have been held by the court not to be entitled to federal copyright. The court has noted that ideas exist only authors' minds and, unless communicated, have value to only their authors (§ 8, infra). As to particular words, the court has stated that any individual word is public property and, therefore, is not susceptible of private appropriation except as part of a combination of words that embody an author's expression. Accordingly, the court has held that one cannot obtain a federal copyright in a particular word (§ 9, infra).

A written or printed work that consists of a compilation of facts is, in the Supreme Court's view, entitled as a whole to federal copyright, despite being derived from uncopyrightable facts, so long as the compilation author demonstrates originality in the manner in which the facts are compiled (§ 10, infra). In addition, the court has observed that books, generally, are copyrightable under federal legislation (§ 12, infra). However, the court has determined that a system that is employed in creating a federally copyrightable written or printed work, or is described or illustrated in such a work, is not itself copyrightable under federal law (§ 11, infra).

In a number of cases, the Supreme Court has discussed or determined whether particular written or printed materials were copyrightable under federal law. The court has held that blank account books that contained ruled lines and headings and were included in federally copyrighted volumes as illustrations of the bookkeeping system that was described and explained in the volumes were not entitled to federal copyright. The court has noted, with respect to the account books, that drawings and diagrams are simply the language employed, rather than words, to convey an author's ideas more clearly (§ 13, infra). According to the court, because federal copyright law, rather than the protecting any particular physical form that is ultimately taken by an author's intellectual production, protects the intellectual production itself, the mere acts of binding a series of magazine articles together as chapters in a single book and paginating the chapters continuously throughout the book did not make the book copyrightable under federal law, where the articles previously had been published as a particular series in issues of a monthly magazine that was itself entitled to federal copyright (§ 14, infra). Written or printed census data have been held by the Supreme Court to be federal uncopyrightable facts, because, rather than being original, population figures in effect are copied by census takers from the world around them (§ 15, infra).

The Supreme Court had determined that written or printed directories, in general, are copyrightable under federal law (§ 16[a], infra). However, the court has held that an alphabetical listing of names, accompanied by towns and telephone numbers, in the white pages of a telephone company's directory were not entitled to federal copyright protection, because the listed names, towns, and telephone numbers were uncopyrightable facts, and the telephone company had not selected, coordinated, or arranged these facts in a manner that demonstrated the originality required for federal copyrightability (§ 16[b], infra). Similarly, although indicating that written or printed news articles, to the extent that they employe a particular method to communicate the news, are federally copyrightable as a whole, the court has determined that the news contained such articles is not copyrightable under federal law, because the news itself is not the creation of the writer of an article containing the news, but constitutes uncopyrightable facts that ordinarily are in the public domain (§ 20, infra). In contrast, the Supreme Court has noted that poems, so long as they possess originality, are copyrightable under federal law (§ 24, infra).

The color code, symbolic characters, and explanatory key used on a series of maps of a particular city

have been held by the Supreme Court not to be copyrightable under federal law, where the court has observed that arbitrary characters designating objects of special interest, and keys explaining the characters, are used by the authors of almost all maps to express their ideas on the faces of maps (§ 19, infra). In addition, the court, explaining that a trademark, as the adoption of a thing which already exists as the distinctive symbol of the party using it, does not depend upon invention or discovery and requires no imagination or laborious thought, has held that trademarks are not copyrightable under federal law (§ 25, infra). Relatedly, the court, commenting that labels intended merely to designate or describe manufactured articles have no value separated from the articles to which they are attached, and that the use of such labels has no connection with the progress, of science and the useful arts, which the Constitution's copyright clause empowers Congress to promote, has indicated that such labels are not entitled to federal copyright (§ 17, infra).

With respect to law reports, the Supreme Court has decided that the writings performed by federal or state judges in the discharge of their judicial duties and contained in volumes reporting the decisions of the courts on which the judges served were not entitled to the protection of federal copyright law, where the judges' writings contained in the law reports included judicial opinions and decisions, statements of cases, syllabuses, and headnotes (§ 18[a], infra). However, the court has determined that court reporters' writings, such as headnotes, statements of facts, statements of arguments, syllabuses, headnotes, case tables, and other original materials, contained in law report volumes were copyrightable under federal law (§ 18[b], infra).

The Supreme Court has determined that written or printed ornamental designs, being the products of genius and the results of composition, were entitled to federal copyright (§ 21, infra), and that, although photography did not exist when the Constitution's copyright clause authorizing Congress to protect authors' writings was created, photographs were copyrightable pursuant to federal legislation and the copyright clause, because the term "writings" in the clause is broad enough to cover photographs, to the extent that they represent original intellectual conceptions (§ 22, infra). Written or printed pictorial illustrations, including prints and engravings, whether they illustrate the text of a book or are contained in another written or printed work—such as a poster—also have been held by the court to be entitled to federal copyright, where the court has noted that the Constitution's copyright clause empowering Congress to promote the progress of science and useful arts by enacting copyright legislation does not limit the useful to that which satisfies immediate bodily needs (§ 23, infra).

[b] Practice pointers

Counsel whose client is unable to obtain a federal copyright in certain materials that have been written or printed by the client—because the materials consist of only federally uncopyrightable facts or ideas—is advised to consider attempting to obtain protection for the client's materials under a legal theory other than copyright. For example, the Supreme Court has noted that an author has, by the common law, a property right in the author's manu-

script[5] and that protection for federally uncopyrightable facts and ideas that are the fruits of an author's research may, in certain circumstances, be available under a theory of unfair competition.[6]

Counsel whose client has obtained, or is seeking to obtain, a federal copyright in a written or printed work is advised to investigate whether the client might also be entitled to a state copyright for the same materials, which copyright might be effective for a longer duration than is a federal copyright. The Supreme Court has commented that the provision, under the Federal Constitution's copyright clause, that Congress may protect the rights of authors to their writings for limited times does not limit the duration of a state copyright, because the copyright clause, in granting power to Congress, can only be understood as a limit on congressional, and not state, action, and the Supreme Court has noted that it is not clear that the dangers to which the limitation in the Constitution is addressed apply with equal force to both the Federal Government and the states, since, although the effects of an exclusive right or monopoly granted by Congress are pervasive, the exclusive right granted by a state is confined to its borders.[7]

II. Factors Affecting Copyrightability of Written or Printed Materials

§ 3. Requirement of originality

[a] Generally

The following decisions of the United States Supreme Court support the rule that in order to be copyrightable under federal law, written or printed materials must possess originality: Trade-Mark Cases (1879) 100 US 82, 25 L Ed 550; Burrow-Giles Lithographic Co. v Sarony (1884) 111 US 53, 28 L Ed 349, 4 S Ct 279; Thornton v Schreiber (1888) 124 US 612, 31 L Ed 577, 8 S Ct 618; Higgins v Keuffel (1891) 140 US 428, 35 L Ed 470, 11 S Ct 731; Mazer v Stein (1954) 347 US 201, 98 L Ed 630, 74 S Ct 460; Harper & Row, Publishers, Inc. v Nation Enterprises (1985) 471 US 539, 85 L Ed 2d 588, 105 S Ct 2218; and Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra.

In Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b], the Supreme Court held that the Federal Constitution's copyright clause mandates that a work must be original to the author, in order to qualify for federal copyright protection. The court said that under the Copyright Act of 1976 (17 USCS §§ 101 et seq.) and its predecessor, the Copyright Act of 1909, the touchstone of copyright protection is originality, where Congress, in revising the 1909 Act in 1976, emphasized that the purpose of the revisions was to clarify, not change, existing law. Noting that the revisions explain that copyright requires originality, the court added that § 101 of the 1976 Act (17 USCS § 101), which defines various terms used in the Act, dictates that the principal focus in determining copyrightability is on the requirement of originality.

☆ COMMENT: Section 102 of

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5. Wheaton v Peters (1834) 33 US 591, 8 L Ed 1055.

6. Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282.

7. Goldstein v California (1973) 412 US 546, 37 L Ed 2d 163, 93 S Ct 2303.

the Copyright Act of 1976 (17 USCS § 102), as amended, supra § 1[d], which lists categories of written and printed materials that for purposes of the Act are works of authorship, specifies that the Act protects "original" works of authorship.

[b] What constitutes originality—generally

The Supreme Court has held or recognized that written or printed materials that, rather than being mechanically created, are independently created and express at least a minimal degree of the author's creativity or intellectual labor possess the originality required in order to be copyrightable under federal law.

In Trade-Mark Cases (1879) 100 US 82, 25 L Ed 550, infra § 25, the Supreme Court said that, in order to possess the originality required for protection under federal copyright legislation in effect when the case was decided, and under the Federal Constitution's copyright clause, an author's written or printed work had to be founded in the creative powers of the author's mind. Such original work was the fruit of intellectual labor rather than the adoption of something already in existence, which adoption required no imagination, genius or laborious thought, the court stated.

The Supreme Court in Burrow-Giles Lithographic Co. v Sarony (1884) 111 US 53, 28 L Ed 349, 4 S Ct 279, infra § 22, indicated that under the Constitution's copyright clause, and under the federal copyright legislation in effect at the time the case arose, a photograph possessed the originality to be copyrightable if the photograph, rather than being a merely mechanical creation with no place for invention, was the photographer's intellectual creation giving visible form to the photographer's original mental conception concerning the photograph.

To the same effect as Burrow-Giles Lithographic Co. v Sarony (1884) 111 US 53, 28 L Ed 349, 4 S Ct 279, supra, is Thornton v Schreiber (1888) 124 US 612, 31 L Ed 577, 8 S Ct 618, in which the Supreme Court recognized its holding in Burrow-Giles concerning the the circumstances under which photographs are copyrightable.

With respect to the requirement, for copyrightability under federal law, that written or printed materials possess some originality, the Supreme Court in Higgins v Keuffel (1891) 140 US 428, 35 L Ed 470, 11 S Ct 731, infra § 17, indicated that the Constitution's copyright clause refers only to materials that result from intellectual labor.

In Harper & Row, Publishers, Inc. v Nation Enterprises (1985) 471 US 539, 85 L Ed 2d 588, 105 S Ct 2218, infra § 10, it was held by the Supreme Court with respect to written or printed work constructed by an author from materials that are not original, that such a work, if it possesses some originality by representing the author's "expression," can embody, as a whole, the originality required, under federal law, for the work to be copyrightable as a whole.

In determining whether certain materials printed in a telephone directory were entitled to a federal copyright, the Supreme Court in Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b], said, with respect to the requirement that such materials possess originality in order to be copyrightable, that under the Constitution's copyright clause, works that are independently

created by the author, as opposed to being copied from other works, and entail at least a minimal degree of creativity are sufficiently original to warrant protection through federal copyright legislation.

[c] —Novelty not necessary for originality

With respect to the requirement that in order to be copyrightable under federal law, written or printed materials must possess originality, the Supreme Court has stated that a written or printed work that is identical to another work that is federally copyrightable is itself federally copyrightable, so long as it is produced independently of the other work and expresses sufficient creativity or intellectual labor on the part of its author, because novelty is not necessary for originality.

Holding that the federal copyright of a book, if not pirated from other works, is valid without regard to the novelty or want of novelty of the book's subject matter, the Supreme Court in Baker v Selden (1880) 101 US 99, 25 L Ed 841, infra § 13, indicated that a book need not exhibit novelty to possess the originality required under federal law for copyrightability. The court noted that the novelty of the art or thing described or explained in a book has nothing to do with the validity of a copyright in the book, because an exclusive property in the art described in a book is the province of a patent rather than a copyright.

In affirming a judgment holding that certain items constituting neither written nor printed materials were copyrightable, the Supreme Court in Mazer v Stein (1954) 347 US 201, 98 L Ed 630, 74 S Ct 460, indicated that written or printed materials need not be novel to possess the originality required under federal law for copyrightability. The court observed that identical or similar written or printed materials produced independently are copyrightable, because a copyright protects originality rather than novelty, and confers only the sole right of multiplying copies.

In Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b], the Supreme Court said that, for purposes of the requirement that a work must be original to be entitled to a federal copyright, a work may be original even though it closely resembles other works, so long as the similarity is fortuitous rather than the result of copying, because originality does not signify novelty. The court noted, for example, that if two people, each ignorant of the other, compose identical written or printed works, although neither work is novel, both are original and, thus, copyrightable under federal law.

§ 4. Purpose of copyright

The Supreme Court, in discussing what is required with respect to written or printed materials for the materials to be copyrightable under federal law, has indicated that the purpose of federal copyright law is to increase the harvest of knowledge by affording encouragement to the production of literary works of lasting benefits to the world, and that federal copyright law, by not allowing facts to be copyrightable, is designed to prevent the wasted effort that would result from an author's being unable to rely on facts contained in prior works.

In Mazer v Stein (1954) 347 US 201, 98 L Ed 630, 74 S Ct 460, the

Supreme Court, affirming a judgment holding that certain items constituting neither written nor printed materials were copyrightable, said, with respect to written or printed materials, that the purpose of federal copyright law is to afford greater encouragement to the production of literary works of lasting benefits to the world, and that the economic philosophy behind the Federal Constitution's copyright clause granting Congress the power to protect the writings of authors is the conviction that the best way to encourage the production of such writings is to promote personal gain from the writings. Although federal copyright law, without imposing burdensome requirements, grants valuable enforceable rights in author's writings to authors and publishers, this benefit to copyright owners is a secondary consideration of federal copyright law, the court commented.

In Harper & Row, Publishers, Inc. v Nation Enterprises (1985) 471 US 539, 85 L Ed 2d 588, 105 S Ct 2218, infra § 10, it was observed by the Supreme Court that federal copyright law protecting the writings of authors is intended to increase rather than impede the harvest of knowledge. Noting that the rights conferred by federal copyright are designed to insure that contributors to the store of knowledge receive a fair return for their labors, the court indicated that federal copyright law is designed to motivate authors' creative activities, while allowing public access to the products of their genius after a limited period of exclusive control has expired.

The primary objective of federal copyright law is not to reward the labor of authors with respect to their writings, but to promote the progress of science and useful arts, the Supreme Court stated in Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b]. Commenting that federal copyright assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by an author's work, the court said that to accord copyright protection on the basis of the doctrine known as "sweat of the brow" or "industrious collection"—the underlying notion of which is that copyright is a reward for the hard work that goes into compiling facts—distorts basic copyright principles, in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of writings by authors. The wasted effort that would result from an author's being unable to rely on facts contained in prior works is the circumstance that the proscription, under federal law, against the copyright of ideas and facts is designed to prevent, the court said.

§ 5. Previous publication

It has been noted by the Supreme Court that a federal copyright in a written or printed work was available only if the work had not been previously published.

The Supreme Court, in Holmes v Hurst (1899) 174 US 82, 43 L Ed 904, 19 S Ct 606, infra § 14, stated that under the federal copyright legislation in effect when the case, which concerned the copyrightability of a book containing a series of previously published magazine articles, was decided, a copyright in a written or printed work was available only with respect to such a work that had not been previously published.

III. Types of Written or Printed Materials Copyrightable

A. In General

§ 6. General scope of "writings" protectable under Federal Constitution's copyright clause

It has been determined by the Supreme Court that the term "writings" in Article I, § 8, clause 8 of the Federal Constitution—which grants Congress the power to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their writings—is subject to liberal construction and an enlarged definition empowering Congress to protect a broad scope of materials, including any form of written or printed material that results from an author's creative or intellectual labor.

In Trade-Mark Cases (1879) 100 US 82, 25 L Ed 550, infra § 25, the Supreme Court said that the word "writings" in the Constitution's copyright clause authorizing Congress to secure for limited times to authors the exclusive right to their writings was subject to liberal construction embodying written and printed materials in various forms.

The term "writings" in the Constitution's copyright clause authorizing Congress to secure for limited times to authors the exclusive right to their writings, although being the only word used to describe an author's works that can be protected by Congress, is subject to an enlarged definition encompassing the written or printed literary production of authors, the Supreme Court indicated in Burrow-Giles Lithographic Co. v Sarony (1884) 111 US 53, 28 L Ed 349, 4 S Ct 279, infra § 22. The court said that the existence of copyright in England at the time of the framing of the United States Constitution indicated that the framers understood the nature of copyright and the materials to which it was commonly applied. Moreover, the court said that Congress, in enacting copyright legislation, very properly had made copyrightable all forms of writing and printing by which ideas in authors' minds were given visible expression.

In affirming a judgment holding that a particular state statute did not conflict with (1) the Constitution's copyright clause authorizing Congress to secure for limited times to authors the exclusive right to their writings, or (2) the federal copyright legislation in effect at the time the Supreme Court decided the case, the Supreme Court in Goldstein v California (1973) 412 US 546, 37 L Ed 2d 163, 93 S Ct 2303, said that the word "writings" in the copyright clause included any written or printed materials representing the fruits of creative intellectual or aesthetic labor. Noting that under the copyright clause, the area in which Congress may act to protect the writings of authors is broad, the court stated that the clause authorizes Congress to enact copyright protection for the categories of writing which Congress determines are worthy of national protection. However, the court observed that the federal copyright legislation in effect at the time the case was decided did not—by (1) making copyrightable all "writings" of an author, (2) specifying categories of protected works, and (3) stating that such specific categorizations did not limit the subject matter of copyright as defined in the portion of the legislation referring to all writings of an author—indicate that Congress, through the legislation, intended to exercise its authority over all writings to which

the copyright clause of the Constitution might apply.

☆ COMMENT: The Supreme Court has not taken the view that Congress' authority to protect any form of written or printed materials resulting from an author's creative or intellectual labor requires Congress to make federal copyright available with respect to all such materials. On the contrary, in Goldstein v California (1973) 412 US 546, 37 L Ed 2d 163, 93 S Ct 2303, the court said that, although the Constitution's copyright clause grants Congress broad authority to act to protect the writings of authors, (1) the determination of whether any specific category of writings is to be brought within the purview of the federal statutory scheme is left to the discretion of Congress; (2) when the need for free and unrestricted distribution of a particular category of writings is thought to be required by the national interest, the copyright clause allows Congress to eschew all copyright protection for such category of writing; and (3) if, with regard to a particular category of writing, Congress determines that neither federal copyright protection nor freedom from restraint is required by the national interest, Congress may stay its hand entirely concerning such category of writing.

§ 7. Facts

In determining whether certain written or printed materials are federally copyrightable, the Supreme Court has held that facts contained in such materials are not copyrightable under federal law, because a fact, rather than being the expression of the creation of the author of a written or printed work that contains the fact, is a matter that is within the public domain and has merely been discovered by the author.

The Supreme Court, in International News Service v Associated Press (1918) 248 US 215, 63 L Ed 211, 39 S Ct 68, 2 ALR 293, infra § 20, indicated that facts contained in a written or printed work are not copyrightable under federal law, because facts are not the creation of a writer, but are public matters.

In Harper & Row, Publishers, Inc. v Nation Enterprises (1985) 471 US 539, 85 L Ed 2d 588, 105 S Ct 2218, infra § 10, it was held by the Supreme Court that no author may copyright, under federal law, the facts contained in written or printed materials, because federal copyright is limited to those aspects of an author's work involving the author's expression and does not cover items, such as facts, which are in the public domain.

In Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b], the Supreme Court indicated that facts contained in written or printed materials are not federally copyrightable, because facts are not the product of an act of authorship, since the first person to find and report a particular fact has not created the fact, but has merely discovered its existence. Referring to a principle known as the fact/expression dichotomy, the court said that a fundamental axiom of basic copyright principles is that no one may copyright facts, and that the wasted effort that would result from authors being unable to rely on scientific, historical, or any other types of facts contained in prior works is the cir-

cumstance which the proscription against the copyright of facts is designed to prevent.

§ 8. Ideas

It has been held by the Supreme Court that, although authors' written or printed expressions of ideas are copyrightable under federal law, the ideas themselves, which exist only in authors' minds and, unless communicated, have value to only their authors, are not federally copyrightable.

It was noted by the Supreme Court in Holmes v Hurst (1899) 174 US 82, 43 L Ed 904, 19 S Ct 606, infra § 14, that the ideas contained in written or printed materials were not copyrightable under federal law. The court commented that the rights secured by federal copyright legislation enacted in 1831 related to the expression of an author's ideas, rather than to such ideas alone, because ideas, in the absence of means of communicating them, are of value to no one but the author. Ideas exist only in the mind, which is not capable of appropriation, the court concluded.

In affirming a judgment holding that certain materials that were neither written nor printed were copyrightable, the Supreme Court in Mazer v Stein (1954) 347 US 201, 98 L Ed 630, 74 S Ct 460, held, with respect to written or printed materials, that only the expression of an idea, rather than the idea itself, is copyrightable under federal law.

The Supreme Court in Harper & Row, Publishers, Inc. v Nation Enterprises (1985) 471 US 539, 85 L Ed 2d 588, 105 S Ct 2218, infra § 10, held that no author may copyright, under federal law, the ideas contained in written or printed materials. The court indicated that federal copyright is limited to the aspects of an author's work involving the author's expression of his or her ideas rather than the ideas themselves.

Referring to a principle known as the idea/expression dichotomy, the Supreme Court in Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b], observed that ideas contained in written or printed materials are not federally copyrightable. The court, in construing the Copyright Act of 1976 (17 USCS §§ 101 et seq.) in order to determine the copyrightbility of certain materials contained in a telephone directory, said that the fundamental axiom that no one may copyright ideas is a basic principle of copyright law.

☆ COMMENT: Section 102 of the Copyright Act of 1976 (17 USCS § 102), as amended, supra § 1[d], which lists categories of written and printed materials that are subject to protection under the Act, specifies that under no circumstances does copyright protection under the Act extend to any idea contained in the materials that are subject to protection.

§ 9. Particular words

The Supreme Court has held that the right to write or print a particular word is not protected under federal copyright law, because an individual word, as common property of the human race, is not susceptible of private appropriation, but can only be appropriated as part of a combination of words that embody an author's expression.

In Holmes v Hurst (1899) 174 US 82, 43 L Ed 904, 19 S Ct 606, infra § 14, the Supreme Court said that the right existing under the copy-

right legislation enacted by Congress in 1790 was not the right to publish certain written or printed words, because words are common property of the human race and are as little susceptible of private appropriation as is air or sunlight. The court commented that the right existing under the copyright legislation was related to an author's expression embodied in his or her combination of words rather than to the words themselves, which could not be appropriated unless combined.

§ 10. Compilations and derivative works

Although holding that written or printed facts alone are not subject to federal copyright, the Supreme Court has determined that a written or printed work consisting of a factual compilation, despite being derived from uncopyrightable facts, is copyrightable as a whole, so long as the compilation author demonstrates originality in the manner in which the facts are compiled.

In Harper & Row, Publishers, Inc. v Nation Enterprises (1985) 471 US 539, 85 L Ed 2d 588, 105 S Ct 2218, the Supreme Court stated that a nonfiction work, even if the work is only a compilation of uncopyrightable facts, may be federally copyrightable as a whole, as a result of the compilation author's original contributions being combined with the uncopyrightable materials. The court reversed a judgment holding that the unauthorized publication of quotations from a former president's unpublished memoirs did not constitute infringement of a copyright in the memoirs, and the court remanded the case for further proceedings.

Although holding that facts alone are not copyrightable under federal law, the Supreme Court in Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b], stated that factual compilations, because they may possess the originality required by the Federal Constitution's copyright clause, generally are federally copyrightable with respect the compilation author's particular selection or arrangement of the facts. Noting that § 101 of the Copyright Act of 1976 (17 USCS § 101)—which, for a compilation of pre-existing material to be copyrightable, requires (1) selection, coordination, or arrangement of the material, and (2) originality based on the selection, coordination, or arrangement—is intended to emphasize that collections of facts are not copyrightable per se, the court said that § 101 envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection, and that § 101 dictates that the principal focus in determining the copyrightability of a factual compilation should be on whether it is sufficiently original to merit protection.

See Holmes v Hurst (1899) 174 US 82, 43 L Ed 904, 19 S Ct 606, infra § 14, wherein the court, in holding that a book containing previously published magazine articles was not copyrightable, said that it did not understand how, after the magazine articles had been published without being federally copyrighted, a copyright could be reclaimed in the articles by collecting them together in the form of a book, unless the court was to incorrectly assume that the federal copyright legislation that existed at the time the case was decided covered the process of mere aggregation of intellectual production.

§ 11. Systems

The Supreme Court has held that a system of arranging, presenting, or manipulating facts that is employed in a federally copyrightable written or printed work, or is described or illustrated in such a work, is not itself copyrightable under federal law.

Affirming a judgment which held that the publisher of a series of maps of one city, which maps were similar to another publisher's series of copyrighted maps of another city, had not infringed the copyright in the latter maps, the Supreme Court, in Perris v Hexamer (1879) 99 US 674, 25 L Ed 308, infra § 19, held that the system of coloring and symbols used on the copyrighted maps was not copyrightable.

In Baker v Selden (1880) 101 US 99, 25 L Ed 841, the Supreme Court concluded that a bookkeeping system that was described in a series of copyrighted volumes that contained blank account books illustrating the system was not copyrightable under federal law. The volumes contained an introductory essay, which explained the bookkeeping system, and certain blank forms consisting of ruled lines and headings that illustrated the system and showed how it was to be used in practice. The system effected the same results as bookkeeping by double entry, but, by a peculiar arrangement of columns and headings, presented an entity's entire financial results for a day, week, or month in a single page or on two pages facing each other in an account book. Reversing a judgment holding that, under the federal copyright legislation in effect at the time the case arose, the copyright owner's copyright in the volumes had been infringed by another party's use of the system that was explained and illustrated in the volumes, the court said that there was a clear distinction between the volumes and the system that they were intended to illustrate. Observing that the illustrations and diagrams used in the volumes happened to correspond more closely than usual with the actual work performed by the operator who uses the artwork, the court indicated that the principle that a system, regardless of whether it was written or printed, was not federally copyrightable was applicable under either circumstance. The court said that the description of a system in a book, although entitled to the benefit of federal copyright, established no foundation for an exclusive claim to the system itself, because the object of the description was explanation, while the object of the system was use. Giving mathematical and scientific systems as examples of other uncopyrightable systems that might be described and illustrated in federally copyrightable written or printed works, the court added that a federal copyright in a book on perspective gave no exclusive right to the systems of drawing described and illustrated in the book.

☆ COMMENT: Section 102 of the Copyright Act of 1976 (17 USCS § 102), as amended, supra § 1[d], which lists categories of written and printed materials that are subject to protection under the Act, specifies that under no circumstances does copyright protection under the Act extend to any system contained in the materials that are subject to protection.

§ 12. Books

The Supreme Court has noted that books, generally, were copyrightable under federal legislation.

In Holmes v Hurst (1899) 174 US 82, 43 L Ed 904, 19 S Ct 606, infra § 14, which concerned the copyrightability of a book containing a series of previously published magazine articles, the Supreme Court indicated that books, generally, were copyrightable under federal legislation that existed at the time the case was decided.

B. Particular Materials

§ 13. Account books

The Supreme Court has held that blank account books that contained ruled lines and headings and were included in federally copyrighted volumes as illustrations of the bookkeeping system that was described and explained in the volumes were not copyrightable under federal law.

The Supreme Court, in Baker v Selden (1880) 101 US 99, 25 L Ed 841, held that blank account books that were contained in federally copyrighted volumes as illustrations of the bookkeeping system described in the volumes were not copyrightable under federal law. The account books, which consisted of blank forms that contained ruled lines and headings, were accompanied in the volumes by a printed explanation of the bookkeeping system, which system effected the same results as bookkeeping by double entry, but, by a peculiar arrangement of columns and headings, presented an entity's entire financial results for a day, week, or month in a single page or on two pages facing each other in an account book. The court reversed a judgment holding that, under the federal copyright legislation in effect at the time the case arose, the copyright in the volumes had been infringed. The court said that the mere copyright of the volumes did not confer upon the volumes' author the exclusive right to make and use account books that were ruled and arranged as designated by the author and were described and illustrated in the volumes.

§ 14. Books consisting of only published, uncopyrighted magazine articles

The Supreme Court has held that, because federal copyright laws protected intellectual production itself, rather than the particular form which such production ultimately took, the mere acts of binding a series of magazine articles together as chapters in a single book and paginating the chapters continuously throughout the book did not make the book federally copyrightable, where the articles previously had been published, but not copyrighted, as a particular series in federal-copyrightable issues of a monthly magazine.

Affirming the dismissal of an action seeking an injunction against the infringement of an alleged copyright in a book that consisted of only articles that previously had been published as a series in issues of a monthly magazine prior to any steps being taken towards securing a federal copyright in the magazine articles, the Supreme Court, in Holmes v Hurst (1899) 174 US 82, 43 L Ed 904, 19 S Ct 606 held that the mere acts of binding the magazine articles together as chapters in a single book and paginating them continuously did not make the book copyrightable, because, under the federal copyright legislation in effect when the magazine articles were published and the book was printed, a copyright in a written or printed work was available only with respect to such a work that had not been previously published. The court rejected the argument that publication of the magazine articles did not constitute

publication of the book, because, according to the court, this argument led to a conclusion—that the whole was greater than the sum of its parts—which was inadmissible in logic as well as in mathematics. The court said that it did not understand how, after the magazine articles had been published without being federally copyrighted, a copyright could be reclaimed in the articles by collecting them together in the form of a book, unless the court was to incorrectly assume that federal copyright legislation covered the process of mere aggregation of intellectual production. Commenting that federal copyright protected the intellectual production itself rather than the particular form which such production ultimately took, the court observed that the word "book" as used in the legislation, which stated that a book was copyrightable, was not to be understood in its technical sense of a bound volume, but was to be understood to include any species of publication which an author selected to embody the author's literary product. The court said that, for copyright purposes, it was unable to appreciate a distinction between the publication of a book and the publication of the contents of the book, whether such contents were published piecemeal or in a single work, because a copyright concerned the arrangement of words which an author had selected to express the author's ideas, which right was detached from a manuscript or from any other physical existence whatsoever. It could not be within the spirit of the federal legislation that a copyright in a book might be obtained after the book's parts, whether published separately or collectively, had been in general circulation, the court concluded.

§ 15. Census data

It has been indicated by the Supreme Court that for purposes of federal law, written or printed census data are uncopyrightable facts.

Census data do not trigger copyright protection under federal law, it was observed in Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, infra § 16[b], because these data are not original in the federal constitutional sense but represent uncopyrightable facts, since census takers, rather than creating the population figures that emerge from their efforts, in a sense copy these figures from the world around them.

§ 16. Directories

[a] Generally

In the following cases, the Supreme Court held or recognized that written or printed directories, in general, were copyrightable under federal law.

In reversing a judgment holding that a printer's copying of another printer's prints advertising a circus constituted infringement of federal copyrights in the prints, the Supreme Court, in Bleistein v Donaldson Lithographing Co. (1903) 188 US 239, 47 L Ed 460, 23 S Ct 298, noted that even the least pretentious picture has more originality than do directories and the like, which may be copyrighted.

Although reversing a judgment in favor of a telephone company in a copyright infringement suit brought by the telephone company against a publishing company that had, without the telephone company's consent, used its white pages listings from its telephone directory in publishing the publishing company's telephone directory, in Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct

1282, the Supreme Court, referring to the Federal Constitution's copyright clause and to the Copyright Act of 1976 (17 USCS §§ 101 et seq.), indicated that directories which feature an original selection or arrangement of facts meet the constitutional minimum for copyright protection.

[b] Telephone directories

The Supreme Court has held that an alphabetical listing of names, accompanied by towns and telephone numbers, in the white pages of a telephone company's directory was not copyrightable under federal law in a particular case, because the listed names, towns, and telephone numbers were uncopyrightable facts, and the telephone company had not selected, coordinated, or arranged these facts in an original way sufficient to satisfy the minimum standards for federal copyrightability.

In Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, the Supreme Court—reversing a judgment for a telephone company in a copyright infringement action brought by the telephone company against a publishing company that had, without the telephone company's consent, used its white pages listing from its telephone directory in publishing the publishing company's telephone directory—held that the alphabetical listing of names, accompanied by towns and telephone numbers, in the white pages of the telephone company's directory was not federally copyrightable. The court said that, although the telephone company's combined white and yellow pages directory, considered as a whole, was copyrightable because it contained some forward text, as well as original material in its yellow pages advertisements, the alphabetical white pages listings were not original to the telephone company, because the names, towns, and telephone numbers constituting these listings, rather than owing their origin to the telephone company, were uncopyrightable facts, and the telephone company had not selected, coordinated, or arranged these facts in an original way sufficient to satisfy the minimum standards for copyrightability under either the Federal Constitution's copyright clause or the Copyright Act of 1976 (17 USCS §§ 101 et seq.). The telephone company had obtained the data for its white pages from its subscribers, who were required to provide their names and addresses to the company when applying for telephone service from the company. The telephone company's selection of data for its white pages listings lacked the modicum of creativity necessary to transform mere selection into copyrightable expression, and there was nothing remotely creative about arranging names alphabetically in a white pages directory, the court commented. Moreover, the court concluded that the telephone company's selection of listings for the white pages might be held to fail the originality requirement for federal copyrightability under the theory that the company did not truly "select" to publish the names and telephone numbers of its subscribers, because the company was required to do so by a state corporation commission, and thus, one could plausibly conclude that this selection was dictated by state law, not by the telephone company.

§ 17. Labels

Noting that written or printed labels intended merely to designate or describe manufactured articles have no value separated from the articles to which they are attached, and that

the use of such labels has no connection with the progress of science and the useful arts, which progress the Federal Constitution's copyright clause empowers Congress to promote, the Supreme Court has held that such labels are not copyrightable under federal law.

In Higgins v Keuffel (1891) 140 US 428, 35 L Ed 470, 11 S Ct 731, it was held by the Supreme Court that a mere descriptive label on an ink manufacturer's bottles of ink was not copyrightable under federal law. The label contained the words "water-proof drawing ink," and, according to the manufacturer, the particular type of ink contained in the bottles had become widely and favorably known and had been extensively sold under the name consisting of the words on the label. Noting that labels which simply designate or describe the articles to which they are attached have no value separated from the articles, the court stated that a label on a box of fruit indicating that the box contains "grapes," even with the addition of adjectives characterizing the grapes as "black," "white," or "sweet," or specifying the place of their growth, does not come within the object of the Constitution's copyright clause, because the use of such a label has no connection with the progress of science and the useful arts. The court said that, similarly, a label designating ink in a bottle as "black," "blue," "red," "indelible," or "insoluable," or as possessing any other quality, has nothing to do with such progress, and, therefore, that it could not be contended by any reasonable argument that the protection of mere labels is within the purpose of the constitutional clause. To be encompassed by the constitutional clause, a written or printed item must have by itself some value as a composition, at least to the extent of serving some purpose other than the purpose of mere advertisement or designation of the subject to which it is attached, the court concluded. Stating that the label in question was not covered by the copyright authorization of the federal copyright legislation in effect at the time the case was decided, the court affirmed a judgment dismissing an action to restrain another ink manufacturer from labeling its ink with the words "water-proof drawing ink."

In reversing a judgment holding that a printer's copying of another printer's prints advertising a circus constituted infringement of federal copyrights in the prints, the Supreme Court, in Bleistein v Donaldson Lithographing Co. (1903) 188 US 239, 47 L Ed 460, 23 S Ct 298, referring to the federal copyright legislation that was in effect at the time the court decided the case, noted that labels designed to be used for manufactured articles were not entitled to a federal copyright.

§ 18. Law reports

[a] Portions authored by judge

It was held by the Supreme Court, in the following cases, that writings produced by federal or state judges in the discharge of their judicial duties and contained in volumes reporting the decisions of the courts on which the judges served were not copyrightable under federal law, where the judges' writings contained in the law reports included judicial opinions and decisions, statements of cases, syllabuses, and headnotes.

In Wheaton v Peters (1834) 33 US 591, 8 L Ed 1055, the Supreme Court indicated that a federal copyright could not be obtained in the United States Supreme Court justices' writ-

ten opinions contained in a series of volumes that reported the cases argued and decided in the Supreme Court, which volumes were known as "Wheaton's Reports." No reporter had or could have any copyright in the written opinions delivered by the Supreme Court, and the Supreme Court justices could not confer on any reporter any such right, the court said. Setting aside a judgment dismissing a copyright infringement claim regarding the law reports, the court remanded the case for a jury trial to determine whether the legal requisites for a valid copyright had been met with respect to the reports' materials that were authored by the court reporter.

☆ COMMENT: Section 105 of the Copyright Act of 1976 (17 USCS § 105), supra § 1[d], provides that copyright protection under the Act is not available for any "work of the United States Government," which term is defined in § 101 of the Act (17 USCS § 101) as a work prepared by a federal officer or employee as part of that person's official duties.

The Supreme Court, in Banks v Manchester (1888) 128 US 244, 32 L Ed 425, 9 S Ct 36, held that, under the federal copyright legislation in existence at the time of the court's decision, the opinions, decisions, statements of cases, syllabuses, and headnotes created by judges in their judicial capacities and included in volumes that reported judicial decisions were not federally copyrightable. The Supreme Court affirmed the dismissal of an action to enjoin the printing and publishing of two volumes of reports of a state court's decisions, by a party other than the one with whom the state had contracted for such printing and publishing. Observing that all materials contained in the two volumes had been written by judges of the state court, the Supreme Court said that whether the principle was a matter of unwritten law, or was an interpretation of federal constitutional or statutory law, there existed a principle that judges could have no pecuniary interest or proprietorship against the public at large in the fruits of the judges' judicial labors, because the whole of such judicial labors constituted the authentic exposition and interpretation of the law, which, binding every citizen, was free to all for publication. There had been a judicial consensus from the time of the court's decision in Wheaton v Peters (1834) 33 US 591, 8 L Ed 1055, supra, that no copyright could, under the statutes passed by Congress, be secured in the products of the labors performed by judges in the discharge of their judicial duties, the court said.

In Callaghan v Myers (1888) 128 US 617, 32 L Ed 547, 9 S Ct 177, although affirming a judgment awarding damages for infringement of a copyright in materials that were written by a reporter of the decisions of a state court and were included in certain volumes that reported the state court's decisions, the Supreme Court held that there can be no federal copyright in the writings, including judicial opinions, produced by judges acting in their official capacities as judges.

[b] Portions authored by court reporter

In the following cases, the Supreme Court held or recognized that, although federal or state judges' official writings contained in law report volumes were not federally copyrightable, court reporters' writings contained in law report volumes,

such as headnotes, statements of facts, statements of arguments, syllabuses, case tables, and other original materials, were copyrightable under federal law.

In Wheaton v Peters (1834) 33 US 591, 8 L Ed 1055, the Supreme Court recognized that a United States Supreme Court reporter's writings contained in volumes of reports of the decisions of the Supreme Court, such as headnotes, statements of facts, statements of arguments, and notations, were copyrightable under federal law.

☆ COMMENT: Note, however, that § 105 of the Copyright Act of 1976 (17 USCS § 105), supra § 1[d], provides that copyright protection under the Act is not available for any "work of the United States Government," which term is defined in § 101 of the Act (17 USCS § 101) as a work prepared by a federal officer or employee as part of that person's official duties.

The Supreme Court recognized, in Banks v Manchester (1888) 128 US 244, 32 L Ed 425, 9 S Ct 36, supra § 18[a], that materials that were written by a reporter of the decisions of a state court and were included in volumes of reports containing the state court's decisions were federally copyrightable.

In Callaghan v Myers (1888) 128 US 617, 32 L Ed 547, 9 S Ct 177, the Supreme Court said that, although there can be no federal copyright in the writings produced by judges acting in their official capacities, the materials that are written by a reporter of a court's decisions and are contained in a volume that reports the court's decisions are copyrightable under federal law. Affirming a judgment awarding damages for infringement of a copyright in certain volumes of the reports of the decisions of a state court, the Supreme Court commented that, although a court reporter might be sworn as a public officer and paid a fixed salary for labors performed as a court reporter, the materials resulting from these labors were subject to federal copyright. The court added that numerous federal and state court reporters had obtained copyrights in materials produced by them in the course of their job performance. The volumes in question allegedly had been prepared by a reporter of the state court's decisions and contained much of the reporter's written work, including syllabuses, headnotes, statements of the facts of cases, arrangements of instructions ruled upon by the court below, preparation and insertion of stipulations made in cases, listings of errors assigned in cases, tables of cited cases, tables of decided cases, and other original materials that were arranged by the reporter in connection with the reported decisions in a mamnner intended to make each volume convenient and valuable to the reader. The Supreme Court said that a federal copyright in such works by a court reporter also covered the order in which the cases were reported, the division of the reports into volumes, and the numbering and paging of the volumes.

§ 19. Map color codes, characters, and keys

The Supreme Court, noting that arbitrary characters designating objects of special interest, and keys explaining the characters, were used by the authors of almost all maps to express their ideas on the faces of the maps, has held that the color code, symbolic characters, and explanatory key printed on a series of

maps of a particular city were not federally copyrightable.

Affirming a judgment which held that the publisher of a series of maps of the city of Philadelphia—which maps employed substantially the same color code, symbolic characters, and key as were employed earlier on a series of federally copyrighted maps of the city of New York—had not infringed the copyrights in the New York maps—which (1) were prepared for use by fire insurers, (2) exhibited lots and buildings in certain wards of the city, and (3) were marked with arbitrary coloring and symbols that allowed an insurer to see at a glance many characteristics of the different buildings useful in making decisions as to risks concerning insuring of the buildings—the Supreme Court, in Perris v Hexamer (1879) 99 US 674, 25 L Ed 308, held that the color code, symbolic characters, and key were not federally copyrightable. The New York maps, which were intended to be used by fire insurers, were marked with arbitrary coloring and characters that, as explained by the key, indicated lot and building locations and allowed insurers to see, at a glance, many building characteristics of which insurers' knowledge was useful in making decisions as to risks connected with insuring the buildings. The court said that arbitrary characters designating objects of special interest, and keys explaining the characters, were used by the authors of almost all maps to express their ideas on the faces of the maps.

§ 20. News and news articles

Distinguishing between the information contained in a news article and the particular method employed in the article to communicate the information, the Supreme Court has determined that the news itself constitutes facts and thus is not subject to federal copyright, but that a written or printed article that reports the news is copyrightable under federal law.

In International News Service v Associated Press (1918) 248 US 215, 63 L Ed 211, 39 S Ct 68, 2 ALR 293, the Supreme Court—in affirming, on the basis of federal copyright law, a judgment enjoining the use of one news gathering agency's original printed news articles by another such agency—held that under the federal copyright legislation in existence at the time the case was decided, (1) news items themselves were uncopyrightable, but (2) written or printed articles that reported the news were copyrightable. Saying that it was necessary to distinguish between the substance of the information contained in a news article and the particular form or collocation of words employed in the article to communicate that substance, the court commented that although news articles often possess a literary quality, the news element of such articles is not the creation of the writer, but is a report of matters that are ordinarily public. The court concluded that the Federal Constitution's framers, when they empowered Congress, under the Constitution's copyright clause, to secure to authors the exclusive right to their writings, did not intend to confer upon one who might happen to be the first to report a news event the exclusive right for any period to spread the knowledge of the event.

In Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, supra § 16[b], the Supreme Court indicated that rather than being original in the federal constitutional sense, the news of the day contained in written

or printed materials constitutes uncopyrightable facts for purposes of federal law, because, rather than creating the news reported in news articles, the people who write the articles in effect copy the news from the world around them.

§ 21. Ornamental designs

The Supreme Court has decided that written or printed ornamental designs, being the product of genius and the result of composition, are federally copyrightable.

In reversing a judgment holding that a copyright in certain volumes containing written illustrations of a particular bookkeeping system had been infringed, the Supreme Court, in Baker v Selden (1880) 101 US 99, 25 L Ed 841, indicated that written or printed ornamental designs are copyrightable under federal law, because (1) their form is their essence, (2) their object and final end is the production of pleasure in their contemplation, and (3) they are sufficiently the product of genius and the result of composition to be federally copyrightable.

§ 22. Photographs

In the following cases, the Supreme Court held or recognized that, although photography did not exist when the Federal Constitution's copyright clause authorizing Congress to protect authors' writings was created, photographs were copyrightable under federal legislation and the copyright clause, because the term "writings" in the clause was broad enough to cover photographs, so far as they represented original intellectual conceptions.

Affirming a judgment which held that a federal copyright in a photograph had been infringed, where the federal copyright legislation that was in effect when the case was decided listed photographs among the items for which a copyright was available, the Supreme Court in Burrow-Giles Lithographic Co. v Sarony (1884) 111 US 53, 28 L Ed 349, 4 S Ct 279, held that Congress has the right, under the Constitution's copyright clause, to protect photographs and photographic negatives by copyright, and that the particular photograph at issue in the case at hand was copyrightable because it was an original product of the photographer's intellectual creation. The court said that the photograph, which was of a person, involved (1) posing of the person, (2) selecting and arranging draperies, the person's costume, and other accessories in the photograph so as to present graceful outlines, (3) arranging and disposing the light and shade, and (4) suggesting and evoking the desired expression, all of which was done according to the photographer's original mental conception to which the photograph gave visible form. Observing that photography did not exist when the Constitution's copyright clause, which authorizes Congress to secure for authors the exclusive right to their writings, was created, the court said that there was no doubt that the term "writings" in the clause was broad enough to cover federal legislation authorizing copyright of photographs, so far as they represented original intellectual conceptions. Stating that the court was not deciding whether the ordinary production of a photograph was merely mechanical, with no place for invention or originality, so as to render a photograph so produced not federally copyrightable, the court held that the photograph in question was copyrightable, because it was an original product of the photographer's intellectual creation.

To the same effect as Burrow-Giles Lithographic Co. v Sarony (1884) 111 US 53, 28 L Ed 349, 4 S Ct 279, supra, is Thornton v Schreiber (1888) 124 US 612, 31 L Ed 577, 8 S Ct 618, in which the Supreme Court recognized its holding in Burrow-Giles concerning the the circumstances under which photographs are copyrightable.

☆ COMMENT: Section 102 of the Copyright Act of 1976 (17 USCS § 102), supra § 1[d], specifies that the Act protects "pictorial, graphic, and sculptural works," which term is defined in § 101 of the Act, supra § 1[d], as including photographs.

§ 23. Pictorial illustrations; prints and engravings

The Supreme Court has held, in the following cases, that certain written or printed pictorial illustrations involve some degree of genius or expression and thus are federally copyrightable, whether they illustrate the text of a book or are contained in another written or printed work, such as a poster, and that prints and engravings that result from intellectual labor are copyrightable under federal law.

Referring to federal copyright legislation that was enacted in 1870 and protected the "writings" of authors, and to the word "writings" in the Federal Constitution's copyright clause, the Supreme Court, in Trade-Mark Cases (1879) 100 US 82, 25 L Ed 550, infra § 25, said that "writings" that were copyrightable under federal law included prints and engravings that were the fruits of intellectual labor.

In reversing a judgment which held that a copyright in certain volumes containing written illustrations of a particular bookkeeping system had been infringed, the court in Baker v Selden (1880) 101 US 99, 25 L Ed 841, said that written or printed pictorial illustrations that, rather than having a practical purpose, are "addressed to the taste" are copyrightable under federal law. Stating that the essence of illustrations that are addressed to the taste is their form, and that the purpose of such illustrations is the production of pleasure in their contemplation, the court contrasted this purpose with the purpose of the the uncopyrightable written illustrations of the bookkeeping system, which purpose was application rather than contemplation. The court concluded that the production of illustrations "addressed to the taste" involves some degree of genius.

In Bleistein v Donaldson Lithographing Co. (1903) 188 US 239, 47 L Ed 460, 23 S Ct 298, although the Supreme Court reversed a judgment holding that a printer's federal copyrights in three chromolithographic prints used by the printer to make posters advertising a circus had been infringed by a second printer's copying of the prints, the court held that under the federal copyright legislation in effect at the time the court heard the case, the prints, as pictorial illustrations, were copyrightable. The word "illustrations" in the legislation, which provided that illustrations were copyrightable, did not refer only to something illustrating the text of a book, but also encompassed pictorial illustrations contained on posters, the court said, and the court added that a picture is nonetheless a picture, and nonetheless a subject of copyright, even if it is used for an advertisement. Each of the three pictures contained a portrait of the circus owner, a particular design, and lettering that in-

dicated the subject of the design and the fact that this subject was to be seen at the circus. One of the designs was of an ordinary ballet, one was of a number of men and women performing on bicycles, and one was of groups of men and women whitened to represent statutes. The court said that whether the pictures were composed from hints or descriptions of actual groups or things, or had been drawn from sight of an actual circus performance, was irrelevant, and that they were copyrightable under either circumstance. The court indicated that personality always contains something unique that when expressed in writing or printing, is federally copyrightable unless otherwise specified in the words of federal copyright legislation. Commenting that that there was no reason to doubt that the three pictures, in all their details and in their designs and particular combinations of figures, lines, and colors, were original works, the court said that even the least pretentious picture has originality. Rejecting the argument that printing and engraving, unless performed for a mechanical end, were not among the useful arts which Congress was empowered by the Constitution's copyright clause to promote, the court said that the copyright clause does not limit the useful to that which satisfies immediate bodily needs.

☆ COMMENT: The text of § 102 of the Copyright Act of 1976 (17 USCS § 102), supra § 1[d], specifies that the Act protects "pictorial, graphic, and sculptural works," which term is defined in § 101 of the Act, supra § 1[d], to include prints.

§ 24. Poems

The Supreme Court has indicated that poems, so long as they possess originality, are copyrightable under federal law.

In Feist Publications, Inc. v Rural Tel. Service Co. (1991, US) 113 L Ed 2d 358, 111 S Ct 1282, supra § 16[b], the Supreme Court—in illustrating the point that for purposes of federal copyrightability, originality does not equal novelty—said that if two poets, each ignorant of the other, compose identical poems, both poems are copyrightable.

§ 25. Trademarks

Trademarks have been held by the Supreme Court not to be copyrightable under federal law, because a trademark, as the adoption of something already in existence as the distinctive symbol of the party using it, does not depend upon invention, discovery, or any work of the brain, and requires no fancy, imagination, genius, or laborious thought.

Holding, in response to certified questions, that certain federal trademark statutes which carried criminal penalties were constitutional, the court in Trade-Mark Cases (1879) 100 US 82, 25 L Ed 550, observed that trademarks were not copyrightable under the existing federal law. Referring to federal copyright legislation that was enacted in 1870 and protected the "writings" of authors, and to the word "writings" in the Federal Constitution's copyright clause, the court noted that although the word "writings" could be liberally construed, it included only works that were the original fruits of intellectual labor. The court said that a trademark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it, and such adoption does not depend upon invention, discovery, or

any work of the brain, and requires no fancy, imagination, genius, or laborious thought, but simply is founded on priority of appropriation. Although one may secure the right to the exclusive use of a trademark, the right to do so is not found in the Federal Constitution's copyright clause, the court concluded.

COLUMBIA v OMNI OUTDOOR ADVERTISING
113 L Ed 2d 382

CITY OF COLUMBIA and COLUMBIA OUTDOOR ADVERTISING, INC., Petitioners

v

OMNI OUTDOOR ADVERTISING, INC.

Reported in this volume: p 382, supra.

Holding: Federal antitrust laws held inapplicable to actions of (1) city which enacted billboard zoning ordinances, and (2) company which controlled relevant billboard market and which lobbied for ordinances.

BRIEFS AND APPEARANCES OF COUNSEL

Joel L. Klein, of Washington, D.C., argued the cause and, with **Paul M. Smith** and **Matthew R. Gutwein,** both also of Washington, D.C., and **Roy D. Bates, James S. Meggs, David W. Robinson, II, Harry A. Swaggart, III,** and **Heyward E. McDonald,** all of Columbia, South Carolina, filed briefs for petitioners:

The City's activities are exempt from antitrust liability under the Parker doctrine.

Columbia Outdoor Advertising's lobbying activities are exempt from antitrust liability under the Noerr doctrine.

A. Camden Lewis, of Columbia, South Carolina, argued the cause and, with **Randall M. Chastain,** also of Columbia, South Carolina, filed a brief for respondent:

Subversion or circumvention of governmental process sustains the judgment.

Corruption of governmental process sustains the judgment.

Charles Rothfeld, Benna Ruth Solomon, Peter J. Kalis, and **Thomas M. Rieter** filed a brief for the National League of Cities, et al. as amici curiae urging reversal.

Steven C. McCracken, Maurice Baskin, John R. Crews, and **Daniel S. York** filed a brief for Associated Builders and Contractors as amicus curiae urging affirmance.

Eric M. Rubin, Walter E. Diercks, and **Desmond P. Brown** filed a brief for the Outdoor Advertising Association of America, Inc. as amicus curiae.

LARRY JOE POWERS, Petitioner

v

OHIO

Reported in this volume: p 411, supra.

Holding: White criminal defendant held to have standing to raise equal

protection objection to prosecutor's allegedly race-based exercise of peremptory challenges to exclude black prospective jurors.

Robert L. Lane, of Columbus, Ohio, by appointment of the court, 494 US 1054, 108 L Ed 2d 761, 110 S Ct 1521, argued the cause and, with **Randall M. Dana** and **Gregory L. Ayers,** both also of Columbus, Ohio, and **Jill E. Stone** filed briefs for petitioner.

Alan Craig Travis, of Columbus, Ohio, argued the cause and, with **Michael Miller,** also of Columbus, Ohio, filed a brief for respondent.

Barbara D. Underwood, Steven R. Shapiro, Julius LeVonne Chambers, and **Charles Stephen Ralston** filed a brief for the American Civil Liberties Union, et al. as amici curiae urging reversal; and **Kent S. Scheidegger** filed a brief for the Criminal Justice Legal Foundation urging reversal.

Harry R. Reinhart and **Kathleen S. Aynes** filed a brief for the Ohio Association of Criminal Defense Lawyers as amicus curiae.

RICHARD B. KAY, Petitioner

v

BREMER EHRLER and KENTUCKY BOARD OF ELECTIONS

Reported in this volume: p 486, supra.

Holding: 42 USCS § 1988 held not to authorize award of attorney's fee to attorney representing himself in successful civil rights action.

BRIEFS AND APPEARANCES OF COUNSEL

Timothy B. Dyk, of Washington, D.C., argued the cause and, with **Robert H. Klonoff** and **Steven T. Catlett,** both also of Washington, D.C., and **Richard B. Kay,** pro se, of Jupiter, Florida, filed briefs for petitioner:

The language of § 1988 requires an award of attorneys' fees for prevailing pro se attorneys in civil rights cases.

The legislative history of § 1988 confirms that pro se attorneys are eligible for attorney fees.

Ann M. Sheadel, Assistant Attorney General of Kentucky, of Frankfort, Kentucky, argued the cause and, with **Frederic J. Cowan,** Attorney General, also of Frankfort, Kentucky, filed a brief for respondents:

The language of 42 USC § 1988 [42 USCS § 1988] does not include pro se litigants in the group of prevailing parties that are eligible for attorneys' fees.

The legislative history of 42 USC § 1988 [42 USCS § 1988] makes it clear that Congress had no intent to make pro se litigants eligible for attorneys' fees.

No justification exists to create a distinction between pro se litigants who are attorneys and pro se litigants who are not attorneys in determining eligibility for attorneys' fees under 42 USCS § 1988 [42 USCS § 1988].

Robert A. Long, of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Stuart M. Gerson,** Deputy Solicitor General **John G. Roberts, Jr., Leonard Schaitman,** and **Marc Richman,** all also of the Department of Justice, Washington, D.C., filed a brief for the United States, as amicus curiae urging affirmance:

The language of § 1988 precludes awards of attorneys' fees to pro se litigants, including pro se lawyers.

The legislative history of § 1988 indicates that Congress intended to limit attorney's fee awards to attorneys with clients.

Brian Wolfman and **Alan B. Morrisson** filed a brief for Public Citizen as amicus curiae urging reversal.

Warren Price, III, Attorney General of Alabama, and **Girard D. Lau** and **Steven S. Michaels,** Deputy Attorneys General, and the following attorneys for their respective jurisdictions filed a brief for the state of Hawaii, et al. as amici curiae urging affirmance: **Don Siegelman,** Attorney General of Alabama, **Charles E. Cole,** Attorney General of Alaska, **Ron Fields,** Attorney General of Arkansas, **Mary B. Stallcup,** First Assistant Attorney General, **Charles M. Oberly, III,** Attorney General of Delaware, **Bob Butterworth,** Attorney General of Florida, **James T. Jones,** Attorney General of Idaho, **Linley E. Pearson,** Attorney General of Indiana, **Thomas J. Miller,** Attorney General of Iowa, **Robert T. Stephan,** Attorney General of Kansas, **Frank J. Kelly,** Attorney General of Michigan, **William L. Webster,** Attorney General of Missouri, **Robert J. Del Tufo,** Attorney General of New Jersey, **Hal Stratton,** Attorney General of New Mexico, **Nicholas J. Smith,** Attorney General of North Dakota, **Ernest Preate,** Attorney General of Pennsylvania, **Travis Medlock,** Attorney General of South Carolina, **R. Paul Van Dam,** Attorney General of Utah, **Jeffrey L. Amestoy,** Attorney General of Vermont, **Mary Sue Terry,** Attorney General of Virginia, and **Joseph B. Meyer,** Attorney General of Wyoming.

TIMOTHY J. LEATHERS, Commissioner of Revenues of Arkansas,
Petitioner

v

DANIEL L. MEDLOCK et al. (No. 90-29)

DANIEL L. MEDLOCK, et al., Petitioners

v

TIMOTHY J. LEATHERS, Commissioner of Revenues of Arkansas, et al.
(No. 90-38)

Reported in this volume: p 494, supra.

Holding: Arkansas held not to have violated Federal Constitution's First

Amendment by extending generally applicable sales tax to cable television services, while exempting print media from such tax.

BRIEFS AND APPEARANCES OF COUNSEL

William E. Keadle, of Little Rock, Arkansas, argued the cause and, with **Larry D. Vaught,** also of Little Rock, Arkansas, filed briefs for petitioner in No. 90-29 and for respondents in No. 90-38:

The state of Arkansas is not unconstitutionally imposing its sales taxes upon the purchase and sales of cable television services.

Eugene G. Sayre, of Little Rock, Arkansas, argued the cause and filed briefs for respondents in No. 90-29 and for petitioners in No. 90-38:

The greater use of the public rights-of-way by cable television does not establish a compelling governmental interest that will justify the discriminatory imposition of Arkansas state and local sales taxes by Act 188 of 1987.

The petitioner's allegations that the members of the Arkansas General Assembly lacked knowledge of the existence of "scrambled" satellite broadcast subscription services are not based on any evidentiary facts established in this case and there is no legal theory adopted by any court that would justify the admittedly discriminatory imposition of Arkansas state and local sales taxes by Act 188 of 1987.

Richard J. Tofel, Robert D. Sack, and **Charles F. Feldman** filed a brief for Dow Jones & Company, Inc. as amicus curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; **D. Craig Martin, Eric E. Breisach,** and **Miriam L. Blanks** filed a brief for Indiana Cable Television Association Inc. as amicus curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; **H. Barstow Farr, III, Richard G. Taranto, Robert H. Tiller, Brenda L. Fox,** and **Michael S. Schooler** filed a brief for National Cable Television Association, Inc. as amicus curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; **Brent N. Rushford, Judith A. Mather,** and **Robin H. Sangston** filed a brief for Cablevision Industries Corp., et al. as amici curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; **Frank W. Lloyd, III, Diane B. Burstein, Caroline O. Roberts, Spencer R. Kaitz, Alan J. Gardner, Carrington F. Phillip,** and **Jeffrey Sinsheimer** filed a brief for the California Cable Television Association as amicus curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; **John P. Cole, Jr., Wesley R. Heppler,** and **Robert G. Scott, Jr.** filed a brief for Century Communications Corp., et al. as amici curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; **Harold R. Farrow, Sol Schildhause,** and **Robert M. Bramson** filed a brief for the Competitive Cable Association, et al. as amici curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; **Robert H. Louis** and **Salvatore M. DeBunda** filed a brief for Greater Media Cablevision, Inc. as amicus curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29; and **Henry L. Baumann, Steven A. Bookshester, Jack N. Goodman,** and **James J. Popham** filed a brief for the National Association of Broadcasters as amicus curiae urging reversal in No. 90-38 and urging affirmance in No. 90-29.

Larrine S. Holbrooke, Tillman L. Lay, William R. Malone, James K. Hahn, Pedro B. Echeverria, Edward J. Perez, Barry A. Lindahl, and **James A. O'Brien** filed a brief for the city of Los Angeles, et al. as amici curiae urging affirmance in No. 90-38 and urging reversal in No. 90-28; and **Norman M. Sinel, Robert Alan Garrett, Carolyn M. Landever, William F. Squadron,** and **Bruce I. Regal** filed a brief for the city of New York, et al. as amici curiae urging affirmance in No. 90-38 and urging reversal in No. 90-28.

WARREN McCLESKEY, Petitioner

v

WALTER D. ZANT, Superintendent, Georgia Diagnostic & Classification Center

Reported in this volume: p 517, supra.

Holding: Federal habeas corpus petitioner held to have abused writ in claiming that admission of informant's testimony at Georgia trial violated right to counsel, where claim was not raised in prior federal petition.

John Charles Boger, of Chapel Hill, North Carolina, argued the cause and, with **Robert H. Stroup,** of Atlanta, Georgia, **George H. Kendall,** of Somerville, New Jersey, **Julius L. Chambers, III** and **Anthony G. Amsterdam,** both of New York City, and **Richard H. Burr, III,** filed briefs for petitioner.

Mary Beth Westmoreland, Senior Assistant Attorney General of Georgia, of Atlanta, Georgia, argued the cause and, with **Michael J. Bowers,** Attorney General, **William B. Hill, Jr.,** Deputy Attorney General, and **Susan V. Boleyn,** Senior Assistant Attorney General, filed a brief for respondent.

Mark E. Olive filed a brief for Alabama Capital Representation Resource Center, et al. as amici curiae urging reversal.

Kent S. Scheidegger filed a brief for Criminal Justice Legal Foundation as amicus curiae urging affirmance.

EASTERN AIRLINES, INC., Petitioner

v

ROSE MARIE FLOYD, et vir, et al.

Reported in this volume: p 569, supra.

Holding: Article 17 of Warsaw Convention held not to allow recovery for mental injury which is unaccompanied by physical injury.

Annotation: p 806, infra.

BRIEFS AND APPEARANCES OF COUNSEL

John Michael Murray, of Miami, Florida, argued the cause and, with **Aurora A. Ares** and **Linda Singer Stein,** both also of Miami, Florida, filed briefs for petitioner:

In permitting recovery for pure mental injury, the decision below ignores the Warsaw Convention's requirement that compensable damages flow from a "bodily injury."

The decision below violates the intent and expectations of the Convention's drafters in disregarding the unequivocal language of Article 17.

The decision below undermines the Convention's purposes of uniformity and predictability by imposing strict liability on carriers for a purely subjective and undemonstrable injury.

The Warsaw Convention is the universal source of air carrier liability for passenger death or injury resulting from an accident in international air transportation.

Joel D. Eaton, of Miami, Florida, argued the cause and filed a brief for respondents:

The Court of Appeals correctly held that Article 17 of the Warsaw Convention provides a remedy for psychic injury and emotional distress unaccompanied by physical injury, when caused by an accident in international air transportation.

On the merits, the Warsaw Convention does not entirely pre-empt the field; it pre-empts local law remedies only to the extent that they are inconsistent with it.

EASTERN AIRLINES, INC. v FLOYD

Reported p 569, supra

ANNOTATION

SUPREME COURT'S CONSTRUCTION AND APPLICATION OF WARSAW CONVENTION (49 Stat 3000 et seq.), PERTAINING TO INTERNATIONAL AIR TRANSPORTATION

by

John F. Wagner Jr., J.D.

I. Preliminary matters

§ 1. Introduction
[a] Scope
[b] Related matters
§ 2. Background, summary, and comment
[a] Generally
[b] Practice pointers

II. General Considerations

§ 3. View that Convention is self-executing treaty
§ 4. View that official French text governs construction
§ 5. View that French legal meanings of terms must be considered

III. Construction and Application Under Particular Circumstances

A. Transportation of passengers

§ 6. Effect, on carrier's liability limitation under Convention, of carrier's

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8 Am Jur 2d, Aviation §§ 53, 113-118, 136

Annotations: See the related matters listed in the annotation.

4 Federal Procedure, L Ed, Aviation and Space §§ 7:575, 7:595-7:612

3A Federal Procedural Forms, L Ed, Aviation and Space §§ 7:311-7:335

4 Am Jur Pl & Pr Forms (Rev), Aviation, Forms 151-155

8 Am Jur Trials 173, Airline Passenger Death Cases

USCS Conventions, Warsaw Convention

L Ed Digest, Aeronautics and Space §§ 3, 5; Treaties §§ 19, 20

L Ed Index, Aviation; Treaties

ALR Index, Warsaw Convention

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

failure to provide passengers with adequate notice of such limitation
§ 7. What constitutes "accident" for which damages can be awarded under convention
§ 8. What injuries to passengers are compensable under Convention

B. Transportation of cargo

§ 9. Effect, on enforcement of Convention's gold-based liability limitation, of repeal of federal statute setting official gold price—generally
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I. Preliminary matters

§ 1. Introduction

[a] Scope

This annotation collects and analyzes the decisions of the United States Supreme Court which have construed or applied provisions of the Warsaw Convention (49 Stat 3000 et seq.), a multilateral treaty which generally provides for both uniform regulation of international air transportation, and liability limitations with respect to passengers and cargo carried on international flights.[1]

[b] Related matters

Treaty or international executive

1. Being limited to decisions which construe or apply the Warsaw Convention, the present annotation does not include cases which merely cite, quote, or paraphrase any of the Convention's provisions.

agreement as limiting recovery available to United States citizens or businesses—Supreme Court cases. 80 L Ed 2d 871.

Construction and application of Warsaw Convention provision (USCS Conventions, Warsaw Convention Art 29(1)) establishing 2-year limitation period for damage action. 103 ALR Fed 286.

Limitation of liability of air carrier for personal injury or death. 91 ALR Fed 547.

What constitutes "accident" under Warsaw Convention. 78 ALR Fed 459.

Limitation on liability of international air carrier for loss of or damage to baggage or goods under Article 22 of the Warsaw Convention. 75 ALR Fed 525.

Warsaw Convention (49 Stat 3000 et seq.) as creating cause of action. 51 ALR Fed 949.

When is passenger on aircraft in international transportation embarking or disembarking within meaning of Article 17 of Warsaw Convention. 39 ALR Fed 452.

Right of airline employee to invoke liability limitations of Warsaw Convention as defense. 38 ALR Fed 949.

Liability under Warsaw Convention (49 Stat 3000 et seq.) of international air carrier for death or injury of passenger sustained in airport terminal during course of terrorist attack. 36 ALR Fed 490.

Liability of air carrier for damage or injury sustained by passenger as result of hijacking. 72 ALR3d 1299.

Construction and validity of "venue" or "jurisdiction" provision of Article 28(1) of Warsaw Convention (49 Stat 3000 et seq.) relating to international transportation by air. 6 ALR3d 1272.

Proper forum and right to maintain action for airplane accident causing death over or in high seas. 66 ALR2d 1002.

◆

Lowenfeld and Mendelsohn, The United States and the Warsaw Convention. 80 Harvard L Rev 497 (January 1967).

Johnson and Minch, The Warsaw Convention Before the Supreme Court: Preserving the Integrity of the System. 52 Journal of Air Law and Commerce 93 (Fall 1986).

Sisk, Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lésion Corporelle. 25 Texas International LJ 127 (Spring 1990).

Olin and Perwin, Punitive Damages Under the Warsaw Convention. 27 Trial 40 (February 1991).

◆

Speiser and Krause, Aviation Tort Law.

§ 2. Background, summary, and comment

[a] Generally

The Warsaw Convention, which is officially denominated as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," is a multilateral treaty that was concluded at Warsaw, Poland, in 1929. The Convention was the result of international conferences at Paris, France in 1925 and at Warsaw, as well as of work done by an interim committee of international aviation law ex-

perts.[2] The United States, which was not an original signatory, subsequently declared its adherence to the Convention in 1934.[3]

It has been said that the effort which produced the Warsaw Convention during the early years of international civil aviation was undertaken with two goals in mind. First, it was desirable that there be a certain degree of uniformity with respect to (1) the documentation, such as tickets and waybills, that was used by international carriers; (2) the procedure followed with respect to claims arising from international transportation; and (3) the substantive law applicable to such claims. The second goal was to limit the potential liability of international carriers in case of accidents, with the hope that the carriers then would be able to reduce operating expenses, which would in turn result eventually in savings to passengers and shippers.[4]

Although many state and lower federal court cases have ruled on the construction and application of various provisions of the Warsaw Convention,[5] the United States Supreme Court has addressed such questions in only a few decisions, the first of which was not handed down until 1984. The court has recognized as general principles in these cases that the Warsaw Convention is a self-executing treaty (§ 3, infra), that the construction of provisions of the Warsaw Convention is governed by the official French text of the Convention (§ 4, infra), and that in construing specific terms used within provisions of the Convention, the French legal meanings of such terms must be considered (§ 5, infra).

The Supreme Court has considered particular provisions of the Convention involving stated liability limitations with respect to the international air transportation of both passengers (§§ 6-8, infra) and cargo (§§ 9-10, infra). As to passengers, it has been held that the stated limitation was not affected by the carrier's failure to provide passengers with adequate notice of such limitation (§ 6, infra). The court has held that a passenger who sustains injury that was not caused by an unexpected or unusual event external to the passenger has not been involved in an "accident" for purposes of the Convention (§ 7, infra). In addition, the court has ruled that a passenger may not recover damages under the Convention where the passenger sustains mental injury which is not accompanied by physical injury (§ 8, infra).

As to the Warsaw Convention's liability limitation for cargo, it has been held that, where a federal statute which had set an official price for the sale of gold was repealed, such repeal had no effect on the enforcement of the limitation (§ 9, infra). The court also has ruled that, under such circumstances, it was not inconsistent with the Convention's limitation that the gold price be set pursuant to federal agency regulation (§ 10, infra).

[b] Practice pointers

Several provisions of the Warsaw Convention which have not been ex-

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2. See Speiser and Krause, Aviation Tort Law § 11:4.

3. 49 Stat 3000 (1934); USCS Conventions, Warsaw Convention.

4. Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, 80 Harvard L Rev 497 (January 1967).

5. See, for example, the state and lower federal court cases which are included in the annotations listed in § 1[b], supra.

amined by the United States Supreme Court may affect the manner in which counsel chooses to proceed when representing a client who seeks recovery for an injury sustained in connection with international air travel. For example, Article 28(1) of the Convention specifies that an action for damages under the Convention must be brought, at the plaintiff's option, "in the territory of one of the High Contracting Parties" having specified connections to the action, but such provision does not distinguish between particular courts within a "territory." It therefore may be advisable, in appropriate cases in which damages otherwise would be recoverable against a carrier in the United States under the Warsaw Convention, that counsel for a party seeking such damages consider bringing the action in a state court, rather than in a federal court. There is federal authority to the effect that, if a plaintiff states a cause of action against a carrier exclusively under state law, the action will not be subject to removal to a federal court, although such action will remain subject to the damage limitations of the Convention.[6]

Furthermore, while Article 29(1) of the Warsaw Convention establishes a 2-year limitations period for initiating an action governed by the Convention, Article 29(2) states that the method of calculating the period is to be determined "by the law of the court to which the case is submitted." Particularly in situations where the time elapsed from event giving rise to the action is near or past the 2-year mark, counsel may find it worthwhile to determine whether a particular jurisdiction in which an action is being contemplated views Article 29 as establishing either (1) a condition precedent to the right to sue, which condition is not subject to tolling under any circumstances; or (2) a statute of limitations which may be tolled in appropriate circumstances.[7]

In a provision which some courts have found to have bearing on the amount of damages that may be awarded in a case covered by the Warsaw Convention, Article 25 of the Convention states that a carrier is not entitled to avail itself of the Convention's liability limitations if damage is caused by the carrier's "willful misconduct." In appropriate cases involving willful misconduct, counsel may wish to consider seeking the recovery of punitive damages —notwithstanding the Convention's liability limitations—on the ground that Article 25 allows for the recovery of such damages,[8] although two federal circuits have rejected such argument.[9]

II. General Considerations

§ 3. View that Convention is self-executing treaty

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6. See 4 Federal Procedure, L Ed, Aviation and Space § 7:597, citing Rhymes v Arrow Air, Inc. (1986, SD Fla) 636 F Supp 737 (Florida wrongful death statute); but see Re Air Disaster at Lockerbie (1991, CA2 NY) 928 F2d 1267, cert den (US) 116 L Ed 2d 272, 112 S Ct 331 (state law preempted where claim falls within scope of Convention).

7. See §§ 3-11 of the annotation at 103 ALR Fed 286; see also Speiser and Krause, Aviation Tort Law § 11:38.

8. See 4 Federal Procedure, L Ed, Aviation and Space § 7:595; see also Hill v United Airlines (1982, DC Kan) 550 F Supp 1048.

9. See Re Air Disaster at Lockerbie (1991, CA2 NY) 928 F2d 1267, cert den (US) 116 L Ed 2d 272, 112 S Ct 331; and Floyd v Eastern Airlines, Inc. (1989, CA11 Fla) 872 F2d 1462, revd on other grounds Eastern Airlines, Inc. v Floyd (1991, US) 113 L Ed 2d 569, 111 S Ct 1489, infra § 8.

It has been recognized by the Supreme Court that the Warsaw Convention is a self-executing treaty.

In ruling that the repeal of a federal statute, which statute had set an "official" price of gold in the United States, did not render unenforceable the gold-based cargo liability limit for international air carriers which was set forth in the Warsaw Convention, the court stated in Trans World Airlines, Inc. v Franklin Mint Corp. (1984) 466 US 243, 80 L Ed 2d 273, 104 S Ct 1776, reh den 467 US 1231, 81 L Ed 2d 885, 104 S Ct 2691, infra § 9, that the Convention was a self-executing treaty, so that no domestic legislation was required to give the Convention the force of law in the United States.

§ 4. View that official French text governs construction

In the following cases, the court recognized that the construction of provisions of the Warsaw Convention was governed by the official French text of the Convention.

Citing Article 36 of the Warsaw Convention,[10] and setting forth the French text of those parts of other articles of the Convention which were relevant in the case at hand, the Supreme Court stated in Air France v Saks (1985) 470 US 392, 84 L Ed 2d 289, 105 S Ct 1338, infra § 7, that the governing text of the Convention is in the French language.

In Eastern Airlines, Inc. v Floyd (1991, US) 113 L Ed 2d 569, 111 S Ct 1489, infra § 8, the court said that because the only authentic text of the Warsaw Convention is in French, the French text must guide the court's analysis of the applicable article of the Convention.

◆

The American translation of Article 36 of the Warsaw Convention provides as follows:

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

The official French text of Article 36 provides as follows:

La présente Convention est rédigée en français en un seul exemplaire qui restera déposé aux archives du Ministère des Affaires Etrangères de Pologne, et dont une copie certifiée conforme sera transmise par les soins du Gouvernement Polonais au Gouvernement de chacune des Hautes Parties Contractantes.

§ 5. View that French legal meanings of terms must be considered

The Supreme Court has recognized that, in construing specific terms used within provisions of the Warsaw Convention, the French legal meanings of such terms must be considered.

In order to determine the meaning of the term "accident" as used in the French text of Article 17 of the Warsaw Convention, the court stated in Air France v Saks (1985) 470 US 392, 84 L Ed 2d 289, 105 S Ct 1338, infra § 7—as support for using French cases and dictionaries in its analysis—that the French legal meaning of such term must be considered. This was true, said the Supreme Court, not because a court was forever chained to French law by the Convention, but because it was the court's responsibility to give the specific words of the Convention

10. For the text of Article 36, see the end of this section.

a meaning consistent with the shared expectations of the contracting parties. The French legal meaning was looked to for guidance, the court observed, because the Convention was drafted in French by continental jurists.

Citing Air France v Saks, supra, the court in Eastern Airlines, Inc. v Floyd (1991, US) 113 L Ed 2d 569, 111 S Ct 1489, infra § 8, said that it had to consider the French legal meaning of the term "lésion corporelle" as used in Article 17 of the Warsaw Convention for guidance as to the shared expectations of the parties to the Convention, since the Convention was drafted in France by continental jurists. Although noting that perhaps the simplest method of determining the meaning of a phrase appearing in a foreign legal text would be to consult a bilingual dictionary, the court stated that dictionary definitions might be too general for purposes of interpreting the Convention. Instead of relying on dictionaries, the court said that it would turn to the principal sources of French law which lawyers trained in French civil law would rely on in 1929, which sources included (1) French legislation; (2) French judicial decisions; and (3) French treatises and scholarly writing covering the period leading up to the Convention.

III. Construction and Application Under Particular Circumstances

A. Transportation of passengers

§ 6. Effect, on carrier's liability limitation under Convention, of carrier's failure to provide passengers with adequate notice of such limitation

It has been held that the limitation, under the Warsaw Convention, on a carrier's liability with respect to the transportation of passengers was not affected by the carrier's failure to provide passengers with adequate notice of such liability limitation.

Affirming a Federal Court of Appeals' judgment, the Supreme Court held in Chan v Korean Air Lines, Ltd. (1989) 490 US 122, 104 L Ed 2d 113, 109 S Ct 1676, that the limited liability of an international air carrier for each passenger under Article 22(1) of the Warsaw Convention[11] was not lost where the carrier failed to provide passengers with adequate notice of the Convention's liability limit. The carrier in the case at hand was a party to the Montreal Agreement of 1966,[12] a private accord which had been executed by carriers and approved by the former Civil Aeronautics Board, and which contained a provision requiring carriers to give passengers written notice of such liability limitation in print size no smaller than 10-point type. Passengers aboard one of the carrier's aircraft—all of whom were killed when the aircraft was destroyed while en route to its destination—had been issued tickets on which the notice appeared in 8-point type. The Supreme Court rejected the argument that Article 3 of the Warsaw Convention[13] removed limited liability protection if adequate notice of the limitation was not provided in passenger tickets. Nothing in Article 3 or elsewhere in the Convention imposed a sanction for failure to provide an "adequate" state-

11. For the text of Article 22(1) of the Convention, see the end of this section.

12. Agreement CAB 18900, 31 Federal Register 7302 (1966).

13. For the text of pertinent provisions of Article 3 of the Convention, see the end of this section.

ment, the court stated. With respect to the language in Article 3(2) to the effect that a carrier was subject to unlimited liability if it "accepts a passenger without a passenger ticket having been delivered," the court pointed out that other language in Article 3(2) indicated that the "irregularity" of a ticket did not affect the existence of the contract of transportation, which remained subject to the Convention—including the liability limitation provided for by the Convention. The use of 8-point type instead of 10-point type for the liability limitation notice was not a shortcoming of such magnitude that the document containing the notice could not reasonably be described as a "ticket" for purposes of Article 3(2), said the court. The court further noted that provisions of the Convention relating to baggage checks (Article 4) and air waybills (Articles 8 and 9) explicitly imposed the loss of the liability limitation for a carrier's failure to provide a statement as to the Convention's liability rules, while Article 3 contained no such provision.

☆ COMMENT: The Montreal Agreement referred to in the above discussion also provided that participating carriers raise their per-passenger liability limitation to $75,000, from the amount fixed by Article 22(1) of the Convention (approximately $8,300).

◆

The American translation of Article 3 of the Warsaw Convention provides in relevant part as follows:
(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
(a)-(d) [Omitted]
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.
(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

The American translation of Article 4 of the Warsaw Convention provides in relevant part as follows:
(1)-(2) [Omitted]
(3) The baggage check shall contain the following particulars:
(a)-(g) [Omitted]
(h) A statement that the transportation is subject to the rules relating to liability established by this convention.
(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

The American translation of Article 8 of the Warsaw Convention provides in relevant part as follows:
The air waybill shall contain the following particulars:
(a)-(p) [Omitted]
(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

The American translation of Article 9 of the Warsaw Convention provides as follows:
If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the

particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

The American translation of Article 22(1) of the Warsaw Convention provides as follows:
(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

§ 7. What constitutes "accident" for which damages can be awarded under Convention

A passenger who sustains injury that was not caused by an unexpected or unusual event external to the passenger has not been involved in an "accident" for which damages can be awarded against a carrier under the Warsaw Convention, the Supreme Court has held.

Reversing a Federal Court of Appeals' judgment, the Supreme Court held in Air France v Saks (1985) 470 US 392, 84 L Ed 2d 289, 105 S Ct 1338, that a carrier's liability under Article 17 of the Warsaw Convention[14] arose only if a passenger's injury was caused by an unexpected or unusual event or happening that was external to the passenger, and that Article 17 did not apply when an injury indisputably resulted from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft. In the case at hand, a passenger on an international flight alleged that the severe pressure and pain which she had experienced in one ear during the aircraft's normal descent, and her subsequent loss of hearing in the ear, had been caused by the negligent maintenance and operation of the aircraft's pressurization system. Evidence indicated that the pressurization had operated in the usual manner. The Supreme Court first found that it was significant that Article 17 imposed liability for injuries to passengers caused by an "accident," while Article 18(1),[15] the parallel provision regarding liability for damage to baggage, imposed liability for destruction or loss caused by an "occurrence" (French "événement"). Second, the court stated, it was also significant that the text of Article 17 referred to an accident which caused (French "qui a causé") the passenger's injury, and not to an accident which was the passenger's injury. The text implied that however "accident" was defined, it was the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone, the court stated. The court observed that French cases and dictionaries, as well as British and American jurisprudence, suggested that when the word "accident" was used to describe a cause of a person's injury, it was usually defined as a fortuitous, unexpected, unusual, or unintended event. Moreover, noted the court, such an interpretation of Article 17 was consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts. Finally, the court rejected the contention that its duty to enforce the "accident" requirement of Article

14. For the text of Article 17 of the Convention, see the end of this section.

15. For the text of Article 18(1) of the Convention, see the end of this section.

17, so as to preclude coverage of passengers' internal injuries incurred during normal aircraft operation, could be circumvented by reference to either (1) the private agreement among international carriers serving the United States known as the Montreal Agreement of 1966;[16] or (2) Annex 13 to the Convention on International Civil Aviation,[17] in which the terms "accident" and "occurrence" were equated.

◆

The American translation of Article 17 of the Warsaw Convention provides as follows:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The official French text of Article 17 provides as follows:

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

The American translation of Article 18(1) of the Warsaw Convention provides as follows:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

The official French text of Article 18(1) provides as follows:

(1) Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés ou de marchandises lorsque l'événement qui a causé le dommage s'est produit pendant le transport aérien.

The American translation of Article 20(1) of the Warsaw Convention provides as follows:

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

§ 8. What injuries to passengers are compensable under Convention

The Supreme Court has ruled that a passenger may not recover damages against a carrier under the Warsaw Convention where the passenger sustains mental injury which is not accompanied by physical injury.

Reversing a Federal Court of Appeals' judgment, the court held in Eastern Airlines, Inc. v Floyd (1991, US) 113 L Ed 2d 569, 111 S Ct 1489, that Article 17 of the Warsaw Convention[18] did not allow recovery for a passenger's mental or psychic injuries which were unaccompanied by physical injury of physical manifestation of injury. According to the court, the narrow issue presented was whether a passenger suffered a "lésion corporelle" within the meaning of Article 17 where only a mental or psychic injury was sustained. The court observed that French dictionaries, as well as both the American and British versions of the Warsaw Convention, translated "lésion corporelle" as "bodily injury." Reviewing French legal materials, the court first noted that there were

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16. Agreement CAB 18900, 31 Federal Register 7302 (1966).

17. See 49 CFR § 830.2.

18. For the text of Article 17 of the Convention, see § 7, supra.

neither any French legislative provisions in force in 1929 that contained the phrase "lésion corporelle," nor any French court decisions before 1929 that explained the phrase. Although it was pointed out, by scholars who argued for a broad construction of the phrase, that French tort law generally permitted tort recovery for mental distress in 1929, the court stated that such a general proposition did not demonstrate that the specific phrase "lésion corporelle" covered purely psychic injury. In response to the conclusion reached by the Court of Appeals below that the wording of Article 17 suggested that the drafters did not intend to exclude any particular category of damages—since the term "blessure" ("wounding") would not have been singled out if only injuries caused by physical impact were to be included—the Supreme Court found such argument to be plausible, but not dispositive in the absence of support by any of the other sources of French legal meaning. With regard to additional aids to construction, the court indicated that the translation of "lésion corporelle" as "bodily injury" was consistent with the negotiating history of the Convention, as to which there appeared to be universal agreement that the subject of mental injuries never arose during the Convention proceedings. Such a translation, continued the court, also was consistent with the Convention's goals of fostering the growth of the fledgling commercial aviation industry and establishing uniform rules governing documentation. Finally, the court stated, the post-Convention conduct and interpretations of the signatories gave further support to the narrow translation of "lésion corporelle," notwithstanding that the English versions of three international aviation agreements reached during the period translated "lésion corporelle" as "personal injury" instead of "bodily injury." The Supreme Court emphasized that it was expressing no view in the case at hand, which did not involve such circumstances, as to whether passengers could recover for mental injuries that were accompanied by physical injuries.

☆ COMMENT: The three international aviation agreements referred to above are (1) the Hague Protocol of 1955, which was not ratified by United States; (2) the Montreal Agreement of 1966, a private agreement among carriers; and (3) the Guatemala City Protocol of 1971, which also was not ratified by United States.

B. Transportation of cargo

§ 9. Effect, on enforcement of Convention's gold-based liability limitation, of repeal of federal statute setting official gold price—generally

It has been held by the Supreme Court that, where a federal statute which had set an official price for the sale of gold was repealed, such repeal had no effect on the enforcement of the limitation under the Warsaw Convention on a carrier's liability with respect to the transportation of cargo.

The Supreme Court held in Trans World Airlines, Inc. v Franklin Mint Corp. (1984) 466 US 243, 80 L Ed 2d 273, 104 S Ct 1776, reh den 467 US 1231, 81 L Ed 2d 885, 104 S Ct 2691, that the repeal in 1978 of the Par Value Modification Act of 1973 (PVMA),[19] which statute had set an

19. PL 93-110, 87 Stat 352.

"official" price of gold in the United States, did not affect the enforceability of the gold-based cargo liability limit for international air carriers under Article 22 of the Warsaw Convention.[20] The PVMA was repealed concurrently with the implementation of the Bretton Woods Agreements Act of 1976, PL 94-564, 90 Stat 2660, effective April 1, 1978, which eliminated gold as the basis of the international monetary system. The Federal Court of Appeals below, although affirming a Federal District Court judgment which limited the liability of a carrier, which in 1979 had lost 714 pounds of numismatic materials, to $6,475.98—a figure derived from the weight of the packages, the liability limits under Article 22, and the gold price set by the PVMA—ruled that the Convention's liability limit would be unenforceable in the United States 60 days from the issuance of its mandate, since (1) enforcement of the Convention required a factor for converting the liability limit into dollars, and (2) there was no federal legislation specifying a factor to be used by United States courts. Rejecting this analysis, but affirming the Court of Appeals' affirmance, the Supreme Court first pointed out that there was a canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. In the case at hand, the court noted, the statute which repealed the PVMA made no reference to the Convention, but instead was intended to give formal effect to a new international monetary system. Second, continued the court, the repeal of a purely domestic piece of legislation was not to be read as an implicit abrogation of any part of the Convention, since the Convention was a self-executing treaty. Third, the court stated, it was unwilling to impute to the political branches of the Federal Government an intent to abrogate a treaty without following the appropriate procedures set out in Article 39 of the Convention,[21] particularly where the Executive Branch continued to maintain that the Convention's liability limit remained in force in the United States. The court added that when the parties to a treaty continued to assert its vitality, a private person who found the treaty's continued existence to be inconvenient could not invoke the doctrine of rebus sic stantibus, under which a party to a treaty may invoke changed circumstances as an excuse for terminating its obligations under the treaty.

◆

The American translation of Article 22 of the Warsaw Convention provides in relevant part as follows:

(1) [Omitted; see § 6, supra]

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 ½ milligrams of gold at the standard of fineness of nine hundred

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20. For the text of pertinent provisions of Article 22 of the Convention, see the end of this section.

21. For the text of Article 39 of the Convention, see the end of this section.

thousandths. These sums may be converted into any national currency in round figures.

The American translation of Article 39 of the Warsaw Convention provides as follows:
(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.
(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

§ 10. —Effect of federal agency regulation

The Supreme Court has ruled that, where a federal statute which had set an official price for the sale of gold was repealed, it was not inconsistent with the limitation under the Warsaw Convention on a carrier's liability with respect to the transportation of cargo that the gold price be set pursuant to federal agency regulation.

In Trans World Airlines, Inc. v Franklin Mint Corp. (1984) 466 US 243, 80 L Ed 2d 273, 104 S Ct 1776, 1984 AMC 1817, reh den 467 US 1231, 81 L Ed 2d 885, 104 S Ct 2691, supra § 9, the court held that a cargo liability limit for international air carriers of $9.07 per pound, which limit was set under orders promulgated by the former Civil Aeronautics Board (CAB) based on the last-stated "official" price for gold in the United States under the repealed Par Value Modification Act of 1973 (PVMA),[22] was not inconsistent with the liability limit for international air carriers under Article 22 of the Warsaw Convention.[23] During the 10 years preceding the repeal, a "two-tier" gold standard had been in place, under which official gold transactions were conducted at an "official" price, while private transactions were made at free market prices. The Supreme Court observed that, since the $9.07-per-pound limit represented a determination by the Executive Branch of the Federal Government, made pursuant to properly delegated authority, of the appropriate rate for converting the Convention's liability limits into United States dollars, the court was bound to uphold the CAB's determination unless it was contrary to law established by domestic legislation or by the Convention itself. After noting that Congress had not suggested that the CAB should use a different conversion factor following the repeal of the PVMA, the court stated that tying the Convention's liability limit to free market prices would fail to effect any purpose of the Convention's framers, either with respect to (1) setting some limit on a carrier's liability for lost cargo, (2) establishing a stable and internationally uniform limit that would encourage the growth of the fledgling international air industry, or (3) linking the limitation to a constant equitable value. The court also observed that a liability limit based on market prices would be inconsistent with the well-established international practice, acquiesced in by the Convention's signatories during the preceding 50 years, of allowing the value of the Convention's liability limit as measured by free market prices of both gold and other commodities to decline substantially, even while the "official" price of gold was formally maintained. Justice Stevens, dissent-

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22. PL 93-110, 87 Stat 352.

23. For the text of pertinent provisions of Article 22 of the Convention, see § 9, supra.

ing, expressed the view that the CAB's liability limitation was void on the grcund that the rate at which a domestic currency could be exchanged for gold was the only conversion permitted or anticipated by the Convention.

Consult POCKET PART in this volume for later case service

COTTAGE SAVINGS ASSOCIATION, Petitioner

v

COMMISSIONER OF INTERNAL REVENUE

Reported in this volume: p 589, supra.

Holding: Financial institution's losses from exchanging its interests in residential mortgage loans for other lenders' interests in residential mortgage loans held tax-deductible in year of exchange.

BRIEFS AND APPEARANCES OF COUNSEL

Dennis L. Manes, of Cincinnati, Ohio, argued the cause and, with **Scott M. Slovin,** also of Cincinnati, Ohio, filed briefs for petitioner:

Section 165 of the Internal Revenue Code does not preclude the deduction of the loss realized and recognized by Cottage.

Cottage's transfer of mortgages resulted in a realized loss, as a matter of law, regardless of whether the mortgages Cottage received differed materially from the mortgages Cottage transferred.

Even if a "materially different" standard did apply to the transactions at issue, the Tax Court was correct in concluding that the mortgages Cottage received were materially different from the mortgages Cottage transferred and Cottage's loss should be realized and recognized.

Acting Solicitor General **John G. Roberts, Jr.,** of the Department of Justice, Washington, D.C., argued the cause and, with Assistant Attorney General **Shirley D. Peterson,** Deputy Solicitor General **Lawrence G. Wallace, Clifford M. Sloan, Richard Farber,** and **Bruce R. Ellisen,** all also of the Department of Justice, Washington, D.C., filed a brief for respondent:

Petitioner did not realize a deductible loss on the swap of one group of mortgage loans for another substantially identical group of mortgage loans.

UNITED STATES, Petitioner

v

CENTENNIAL SAVINGS BANK FSB (RESOLUTION TRUST CORPORATION, Receiver)

Reported in this volume: p 608, supra.

Holding: Financial institution held (1) to realize tax-deductible losses on exchange of interests in mortgage loans, and (2) not entitled to exclude depositors' early withdrawal penalties from taxable income.

BRIEFS AND APPEARANCES OF COUNSEL

Acting Solicitor General **John G. Roberts, Jr.,** of the Department of Justice, Washington, D.C., argued the cause and, with Assistant Attorney

General **Shirley D. Peterson,** Deputy Solicitor General **Lawrence G. Wallace, Clifford M. Sloan, Richard Farber,** and **Bruce R. Ellisen,** all also of the Department of Justice, Washington, D.C., filed briefs for petitioner:

Respondent did not realize a deductible loss on the swap of one group of mortgage loans for another substantially identical group.

Income received by respondent from its depositors as penalties for early withdrawal of their funds was not excludable from gross income as income from the discharge of indebtedness under § 108 of the Internal Revenue Code.

Michael F. Duhl, of Washington, D.C., argued the cause and, with **Mark L. Perlis, Frederic W. Hickman, Bradford L. Ferguson, Alfred J. T. Byrne, Mark I. Rosen, Dorothy L. Nichols, Ann S. Duross, Collen B. Bombardier, Beatrice Valdez,** and **Daniel R. Richards,** all also of Washington, D.C., filed a brief for respondent:

The respondent realized a loss upon the exchange of interests in 420 mortgage loans for interests in 377 different mortgage loans.

Amounts forfeited by depositors upon early withdrawal of their certificates of deposit were income to respondent by reason of the discharge of indebtedness.

Joseph Angland, Felix B. Laughlin, David C. Garlock, Richard F. Neel, Jr., Dewey Ballantine, Caryl S. Bernstein, Carolyn J. A. Swift, and **Michel A. Dazé** filed a brief for the Federal National Mortgage Association as amicus curiae urging affirmance; **Zachary P. Alexander, Harry J. J. O'Neill,** and **William S. Pilling, III** filed a brief for Main Line Federal Savings Bank, et al. as amici curiae urging affirmance; and **Richard L. Bacon, David C. Simmons,** and **Philip Gasteyer** filed a brief for the United States League of Savings Institutions as amicus curiae urging affirmance.

CARNIVAL CRUISE LINES, INC., Petitioner

v

EULALA SHUTE, et vir

Reported in this volume: p 622, supra.

Holding: Forum-selection clause in cruise tickets held enforceable in ticketholders' personal-injury action, despite lack of bargaining over clause and alleged inconvenience to ticketholders.

Annotation: p 823, infra.

BRIEFS AND APPEARANCES OF COUNSEL

Richard K. Willard, of Washington, D.C., argued the cause and, with **David L. Roll** and **David A. Price,** both also of Washington, D.C., **Jonathan Rodriguez-Atkatz,** of Seattle, Washington, and **Lawrence D. Winson,** of Miami, Florida, filed briefs for petitioner:

The District Court lacks in personam jurisdiction because the cause of action does not "arise out of or relate to" any activities of defendant in the forum state.

If jurisdiction were established, this case would have to be dismissed or transferred in accordance with the forum selection clause in the ticket contract.

Proper resolution of this case will promote the efficiency and fairness of the legal system by making forum selection more determinate.

Gregory J. Wall, of Port Orchard, Washington, argued the cause and, with **Geoffrey D. Swindler,** also of Port Orchard, Washington, filed a brief for respondents:

The District Court has in personam jurisdiction over petitioner because its contracts with Washington are sufficient for specific jurisdiction and because the cause of action arises out of petitioner's contracts with Washington.

The lower court correctly found the forum selection clause invalid since the clause violated this court's holding in M/S Bremen v Zapata Off Shore Co., 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907.

Herbert L. Fenster, Kenneth W. Weinstein, Stanley W. Landfair, J. Keith Burt, and **Robin S. Conrad** filed a brief for the Chamber of Commerce of the United States as amicus curiae urging reversal; and **John A. Flynn** and **James B. Nebel** filed a brief for the International Committee of Passenger Lines as amicus curiae urging reversal.

ANNOTATION

VALIDITY, UNDER FEDERAL LAW, OF CONTRACTUAL PROVISION LIMITING PLACE OR COURT IN WHICH ACTION MAY BE BROUGHT—SUPREME COURT CASES

by

John F. Wagner Jr., J.D.

§ 1. Introduction
[a] Scope
[b] Related matters
§ 2. Background, summary, and comment
[a] Generally
[b] Practice pointers

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17A Am Jur 2d, Contracts § 266; 20 Am Jur 2d, Courts § 141; 32 Am Jur 2d, Federal Employers' Liability and Compensation Acts § 9; 32B Am Jur 2d, Federal Practice and Procedure §§ 2168, 2290; 62B Am Jur 2d, Private Franchise Contracts §§ 409, 410; 70 Am Jur 2d, Shipping §§ 660, 661, 681, 819

Annotations: See the related matters listed in the annotation.

1 Federal Procedure, L Ed, Access to District Court §§ 1:629, 1:737; 11 Federal Procedure, L Ed, Employers' Liability Acts § 30:29; 23 Federal Procedure, L Ed, Maritime Law and Procedure § 53:61

24A Am Jur Pl & Pr Forms (Rev), Venue, Forms 254, 255

3 Am Jur Trials 681, Tactics and Strategy of Pleading

45 USCS §§ 55, 56; 46 USCS Appx § 183c

L Ed Digest, Contracts § 101; Courts §§ 25, 529; Evidence § 952; Federal Employers' Liability and Workers' Compensation Acts § 46

L Ed Index, Admiralty; Employers' Liability; Forum Selection Clause; International Law and Matters; Venue

ALR Index, Admiralty; Contracts; Labor and Employment; Venue

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

§ 3. View that forum-selection clauses are prima facie valid and enforceable if not unreasonable or contrary to public policy, generally
§ 4. Validity under particular federal laws
[a] General admiralty law—towage contract
[b] —Passage contract
[c] Limitation of Vessel Owner's Liability Act
[d] Federal Employers' Liability Act

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§ 1. Introduction

[a] Scope

This annotation collects and analyzes those decisions in which the United States Supreme Court has determined the validity, under federal law, of a contractual provision which limits the place or court[1] in which an action may be brought by the parties.[2]

[b] Related matters

Comment Note.—What conduct constitutes waiver of venue privilege —federal cases. 5 L Ed 2d 1056.

Pre-emption by Federal Arbitration Act (9 USCS §§ 1 et seq.) of state laws prohibiting or restricting formation or enforcement of arbitration agreements. 108 ALR Fed 179.

Comment Note.—Admiralty jurisdiction in matters of contract. 29 ALR Fed 325.

Federal view as to effect of conditions appearing on back or margin of passenger's ticket for ocean voyage. 5 ALR Fed 394.

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1. Excluded from the present annotation are Supreme Court cases involving questions as to the validity of contract clauses which provide for dispute resolution by submission to arbitration in a given forum. See 5 Am Jur 2d, Arbitration and Award §§ 6, 30; and the annotations at 108 ALR Fed 179 and 12 ALR3d 892.

2. This annotation does not include cases which merely cover the validity of contractual provisions which (1) authorize the bringing of an action in a specified place or court, but do not require the action to be brought in that place or court to the exclusion of others; (2) specify that an action brought in one court cannot be removed to another court; or (3) specify that the contract involved is to be interpreted under the law of a particular jurisdiction.

Validity or enforceability, under Carriage of Goods by Sea Act (46 USC §§ 1300 et seq.), of clauses in bill of lading or shipping contract as to jurisdiction of foreign courts or applicability of foreign law. 2 ALR Fed 963.

Validity of contractual provision limiting place or court in which action may be brought. 31 ALR4th 404.

Validity and effect of stipulation in contract to effect that it shall be governed by law of particular state which is neither place where contract is made nor place where it is to be performed. 16 ALR4th 967.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 ALR3d 892.

Sufficiency of contractual designation of place of performance to fix venue at that place, under statute authorizing or requiring such venue. 97 ALR2d 934.

Validity of contractual provision authorizing venue of action in particular place, court, or county. 69 ALR2d 1324.

◆

Covey and Morris, The Enforceability of Agreements Providing for Forum and Choice of Law Selection. 61 Denver LJ 837 (1984).

Cutler, Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum. 20 Texas International LJ 97 (Winter 1985).

◆

Williston on Contracts (3d ed).

§ 2. Background, summary, and comment

[a] Generally

For many years, the prevailing view in American jurisprudence was that an agreement which purported to exclude the jurisdiction of courts other than those specifically named in the written contract between the parties was unenforceable as against public policy.[3] This traditional rule, however, appears to have been cast aside by modern courts, at least with respect to contracts whose provisions are not otherwise governed by statute.[4] The United States Supreme Court, beginning in 1972, has expressed the view that as a matter of federal law, forum-selection clauses are prima facie valid and should be enforced unless they can be shown under the circumstances to be unreasonable or contrary to federal public policy as declared by statute or judicial decision (§ 3, infra).

The Supreme Court also has held, in particular circumstances under the general admiralty law, that forum-selection clauses were valid and enforceable where such clauses were included in a maritime contract involving towage (§ 4[a], infra) and in a cruise ticket, which was a type of form passage contract (§ 4[b], infra). The court has also ruled that the Limitation of Vessel Owner's Liability Act (46 USCS Appx § 183c) was not invalidated by such a clause (§ 4[c], infra). However, the court held (§ 4[d], infra) that a forum-selection clause was invalid in circumstances involving the Federal Employers' Liability Act (45 USCS § 55).

[b] Practice pointers

Where an action has been filed in a Federal District Court, notwith-

3. See, for example, Home Ins. Co. v Morse (1874) 87 US 445, 22 L Ed 365 (parties cannot by contract oust the ordinary courts of their jurisdiction).

4. 17A Am Jur 2d, Contracts § 266.

standing a contractual forum-selection clause which eliminates every Federal District Court as a possible arena for litigation between parties to the contract, counsel for the defendant should consider moving to dismiss the action based on such clause; if the motion is denied, however, such denial has been held by the Supreme Court not to be immediately appealable under 28 USCS § 1291 as a collateral order.[5]

However, where a contract clause eliminates some, but not all, Federal District Courts from consideration as a potential forum, and the action is filed in a Federal District Court not within the purview of the clause, counsel for the defendant may find it advisable to move to transfer the action under the venue provisions of 28 USCS § 1404(a); in ruling on such a motion, the District Court will treat the forum-selection clause as one of several relevant factors for its consideration, even where the clause might not be enforced, as a matter of public policy, under the applicable state law in the district in which the action was filed.[6]

§ 3. View that forum-selection clauses are prima facie valid and enforceable if not unreasonable or contrary to public policy, generally

The Supreme Court has adopted the view that under federal law, contractual forum-selection clauses are prima facie valid and enforceable absent a showing that enforcement would be unreasonable or contrary to public policy.

Although an earlier Supreme Court decision apparently took an opposing view,[7] the court ruled in M/S Bremen v Zapata Off-Shore Co. (1972) 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907, infra § 4[a]—a case involving a contract between an American corporation and a German corporation which had agreed to tow the American corporation's ocean-going drilling rig—that, although contractual forum-selection clauses historically had not been favored by American courts, the correct doctrine to be followed by Federal District Courts sitting in admiralty was that such clauses were prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances, such as where enforcement would contravene a strong public policy of the forum as declared by statute or judicial decision.[8] Observing that it was settled that parties to a contract could agree in advance to submit to the jurisdiction of a given court, the Supreme Court said that the argument that forum-selection clauses were improper because they tended to oust a court of jurisdiction was hardly more than a vestigial legal fiction. There were compelling reasons, continued the Supreme Court, why a freely negotiated private international agreement which was unaffected by fraud, undue influence, or overweening bargaining power

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5. Lauro Lines s.r.l. v Chasser (1989) 490 US 495, 104 L Ed 2d 548, 109 S Ct 1976 (Naples, Italy designated as sole forum).

6. See, for example, Stewart Organization, Inc. v Ricoh Corp. (1988) 487 US 22, 101 L Ed 2d 22, 108 S Ct 2239 (clause limits forums to state or federal court in Manhattan; action filed in Federal District Court in Alabama).

7. Home Ins. Co. v Morse (1874) 87 US 445, 22 L Ed 365.

8. As to the effect of a strong public policy against forum-selection clauses, the court cited Boyd v Grand T. W. R. Co. (1949) 338 US 263, 94 L Ed 55, 70 S Ct 26, infra § 4[d].

should be given full effect. The Supreme Court added that in light of present-day commercial realities and expanding international trade, a forum-selection clause agreed upon in an international commercial transaction should control absent a strong showing that it should be set aside. Even in situations where two Americans contracted to resolve their essentially local disputes in a remote alien forum pursuant to a forum-selection clause, noted the court, a party seeking to avoid enforcement of the clause bore a heavy burden of proof.

Also to the effect that forum-selection clauses should be given full effect when a freely negotiated private international agreement is unaffected by fraud is the decision in Scherk v Alberto-Culver Co. (1974) 417 US 506, 41 L Ed 2d 270, 94 S Ct 2449, reh den 419 US 885, 42 L Ed 2d 129, 95 S Ct 157.

§ 4. Validity under particular federal laws

[a] General admiralty law—towage contract

It has been held by the Supreme Court under particular circumstances that as a matter of general admiralty law, a forum-selection clause in a towage contract was valid.

Vacating a Federal Court of Appeals judgment in which the Court of Appeals declined, on public policy grounds, to enforce a forum-selection clause in a contract between an American corporation and a German corporation which had agreed to tow the American corporation's ocean-going drilling rig from Louisiana to the Adriatic Sea, the Supreme Court held in M/S Bremen v Zapata Off-Shore Co. (1972) 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907, that the clause—which provided that any dispute arising must be treated before the London Court of Justice—should be specifically enforced by a Federal District Court sitting in admiralty unless it could be shown that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. The Supreme Court, in remanding the case for further proceedings, observed that the case involved a far-from-routine transaction between companies of two different nations, which transaction contemplated the tow of an extremely costly piece of equipment through the waters of many jurisdictions. The elimination of uncertainties as tow where a suit could be maintained by agreeing in advance on a forum acceptable to both parties was an indispensable element in international trade, said the court, and it would be unrealistic to think that the parties involved did not conduct their negotiations—including fixing the monetary terms—with the consequences of the forum-selection clause figuring prominently in their calculations. Furthermore, said the court, whatever inconvenience the American corporation would suffer by being forced to litigate in a London forum was clearly foreseeable at the time of contracting. The Supreme Court distinguished the international towage contract in the case at hand from the domestic towage contract involved in one of the court's earlier decisions,[9] in which the court had ruled that enforcement of an exculpatory clause would be contrary to the public policy of the forum.

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9. Bisso v Inland Waterways Corp. (1955) 349 US 85, 99 L Ed 911, 75 S Ct 629.

[b] —Passage contract

Under particular circumstances, the Supreme Court has upheld the validity of a forum selection clause in a passage contract as a matter of general admiralty law.

Reversing a Federal Court of Appeals judgment against a cruise line in an admiralty case, the Supreme Court ruled in Carnival Cruise Lines, Inc. v Shute (1991, US) 113 L Ed 2d 622, 111 S Ct 1522, that a forum-selection clause in the cruise line's passage contract tickets—which clause provided that any disputes arising under the contract must be litigated, if at all, in courts located in the state of Florida—could be enforced to bar an action brought in a Federal District Court in the state of Washington by a husband and wife who, having purchased such tickets through a Washington travel agent for, and having taken a cruise between, California and Mexico, alleged that the wife had been injured due to the negligence of the cruise line and its employees while the ship was in international waters off the coast of Mexico. The Supreme Court stated that the inclusion of a reasonable forum-selection clause in a form ticket contract was permissible, even though the clause was not the subject of bargaining, given that (1) a cruise line, which typically carried passengers from many locales, had a special interest in limiting the fora in which the line could be subject to suit; (2) such a clause had the salutary effect of dispelling any confusion about where suits arising under the contract had to be brought and defended, thus sparing litigants and courts the time and expense of litigating those issues; and (3) cruise line passengers benefitted in the form of reduced fares reflecting the savings which the line enjoyed by limiting the fora where it could be sued. The husband and wife had not satisfied the heavy burden of proof required to set the clause aside on grounds of inconvenience, continued the court, given that (1) Florida was not a remote alien forum; (2) in view of the location of the accident, the dispute was not essentially local in character and thus not inherently more suited to resolution in the Washington than in Florida; and (3) the couple had not claimed lack of notice of the forum-selection clause. Furthermore, the court said, there was no indication that the cruise line—a Panamanian corporation which had its principal place of business in Florida and which ran many cruises using Florida ports—either had set Florida as the forum as a means of discouraging legitimate claims by passengers, or had obtained the couple's accession to the clause through fraud or overreaching. Justice Stevens, joined by Justice Marshall, dissenting, expressed the view that the general rule denying the enforcement of forum-selection clauses that had prevailed prior to the decision in M/S Bremen v Zapata Off-Shore Co. (1972) 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907, supra § 3, ought to continue to be applied to forum-selection clauses in standardized passenger tickets.

[c] Limitation of Vessel Owner's Liability Act

The Limitation of Vessel Owner's Liability Act, 46 USCS Appx § 183c, prohibits owners of passenger vessels serving United States ports from inserting into its contracts any provision which purports to lessen, weaken, or avoid the right of any claimant to a trial by a court of competent jurisdiction. The Supreme Court has held under particular circumstances that a contractual forum-selection clause did not violate § 183c.

In Carnival Cruise Lines, Inc. v Shute (1991, US) 113 L Ed 2d 622, 111 S Ct 1522, supra § 4[b], the court ruled that the enforcement of the plain language of a forum-selection clause in a cruise line's passage contract tickets—which clause provided that any disputes arising under the contract must be litigated, if at all, in courts located in the state of Florida—did not take away the right to a trial by a court of competent jurisdiction, in violation of 46 USCS Appx § 183c, of a personal-injury action against the cruise line by a husband and wife who had purchased such tickets through a state of Washington travel agent for, and had taken a cruise between, California and Mexico. The Supreme Court observed that although the husband and wife contended that Congress' intent in enacting § 183c was to avoid having a plaintiff travel to a distant forum in order to litigate, the legislative history of § 183c suggested instead that § 183c was enacted in response to passenger-ticket conditions purporting to limit a shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of an arbitration clause. Justice Stevens, joined by Justice Marshall, dissenting, expressed the view that the forum-selection clause, which as such had been unenforceable under common law at the time that § 183c had been enacted, was null and void under a liberal reading of § 183c, since the clause lessened or weakened the couple's ability to recover by compelling litigation in a Florida court.

[d] Federal Employers' Liability Act

It is provided in § 5 of the Federal Employers' Liability Act (FELA), 45 USCS § 55, that any contract which is intended to enable a common carrier to exempt itself from liability under the FELA is void to that extent. The Supreme Court has held that a forum-selection clause in a contract between a common carrier and an injured employee was invalid as violative of § 55.

Reversing a judgment of a state's highest court in favor of a railroad, the Supreme Court held in Boyd v Grand T. W. R. Co. (1949) 338 US 263, 94 L Ed 55, 70 S Ct 26, that an agreement by an injured railroad employee on receiving cash advancements from the railroad, in which agreement the employee restricted his choice of venue for any action against the railroad under the FELA to the county or district of his residence at the time of injury or that in which the injury was sustained, was void as enabling the railroad to exempt itself from liability in violation of 45 USCS § 55. The Supreme Court stated that it would thwart the express purpose of the FELA to sanction defeat of the substantial right to select a forum, which right was granted by § 6 of the FELA (45 USCS § 56), by the device employed in the case at hand.

☆ OBSERVATION: The Boyd Case apparently has retained its vitality in the aftermath of the Supreme Court's adoption in M/S Bremen v Zapata Off-Shore Co. (1972) 407 US 1, 32 L Ed 2d 513, 92 S Ct 1907, supra § 3, of a prima-facie-validity rule for contractual forum-selection clauses, since the Boyd Case was cited in the Bremen Case in support of the proposition that such a clause should be held unenforce-

able if enforcement would contravene a strong public policy of the forum in which suit is brought.

Consult POCKET PART in this volume for later case service

BRIEFS OF COUNSEL

AMERICAN HOSPITAL ASSOCIATION, Petitioner

v

NATIONAL LABOR RELATIONS BOARD, et al.

Reported in this volume: p 675, supra.

Holding: NLRB rule providing that with three exceptions, eight and only eight defined employee units are appropriate for collective bargaining in acute care hospitals held not facially invalid.

BRIEFS AND APPEARANCES OF COUNSEL

James D. Holzhauer, of Chicago, Illinois, argued the cause and, with **Kenneth S. Geller, Thomas C. Berg, Fredric J. Entin,** and **Rhonda A. Rhodes,** all also of Chicago, Illinois, and **Arthur R. Miller,** of Cambridge, Massachusetts, filed briefs for petitioner:

The NLRB's hospital bargaining unit rule is invalid because it conflicts with the language and legislative history of the NLRA and ignores critical distinctions among the nation's 4,000 covered hospitals.

Deputy Solicitor General **David L. Shapiro,** of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr** and **Stephen L. Nightingale,** both also of the Department of Justice, Washington, D.C., and **Jerry M. Hunter, D. Randall Frye, Robert E. Allen, Norton J. Come,** and **Linda Sher,** all of the National Labor Relations Board, Washington, D.C., filed a brief for respondent National Labor Relations Board:

The hospital bargaining unit regulation is consistent with § 9(b) of the National Labor Relations Act.

The Board's rule is consistent with the 1974 amendments to the NLRA.

The Board's rule is not arbitrary, capricious, or an abuse of discretion.

Woody N. Peterson, Marcus C. Migliore, David Silberman, Laurence Gold, Helen Morgan, Richard Griffin, Michael Fanning, Allison Beck, James Grady, Jonathan Hiatt, Richard Kirschner, Patrick Scanlon, and **George Murphy,** all of Washington, D.C., **Miriam Gafni,** of Philadelphia, Pennsylvania, **Bruce Miller,** of Southfield, Michigan, and **Daniel Ratner,** of New York City, filed a brief for respondents American Nurses Association, et al.:

The NLRB correctly, and in all events rationally, interpreted NLRA § 9(b) to permit the Board to base its unit decisions on rules of general applicability.

The 1974 amendments do not impose a legal duty on the Board which would preclude the Board from promulgating its hospital bargaining unit rule.

The Board did not act arbitrarily or capriciously in promulgating the rule.

John G. Kruchko and **Paul M. Lusky** filed briefs for the Fairfax Hospital System, the Maryland Hospital Association, Inc., and the Virginia

Hospital Association, each as amicus curiae urging reversal; **Robert M. Stone** and **Dana D. Howells** filed a brief for the California Association of Hospitals and Health Systems, et al. as amici curiae urging reversal; **Lawrence J. Barty** and **Frank H. Stewart** filed a brief for the Greater Cincinnati Hospital Council as amicus curiae urging reversal; **John E. Lyncheski, Michael J. Reilly, E. Donald Ladov, Ronald J. Andrykovitch,** and **Jeffrey P. Bauman** filed a brief for Hospital Association of Pennsylvania, et al. as amici curiae urging reversal; **G. Roger King, Paul E. Harner,** and **Glen D. Nager** filed a brief for the Society for Human Resource Management as amicus curiae urging reversal; **E. J. Holland, Jr., Peggy F. Schmitt,** and **Gerald M. Sill** filed a brief for the Missouri Hospital Association as amicus curiae urging reversal; **Jeff Weintraub** and **Richard D. Bennett** filed a brief for St. Francis Hospital, Inc., of Memphis as amicus curiae urging reversal; and **Theodore R. Opperwall** filed a brief for William Beaumont Hospital, et al. as amici curiae urging reversal.

Lawrence Rosenzweig filed a brief for Union of American Physicians and Dentists as amicus curiae urging affirmance.

CALIFORNIA, Petitioner

v

HODARI D.

Reported in this volume: p 690, supra.

Holding: Cocaine discarded by person fleeing police officer held not to be fruit of "seizure" within meaning of Fourth Amendment, where officer had not touched person at time cocaine was discarded.

BRIEFS AND APPEARANCES OF COUNSEL

Ronald E. Niver, Deputy Attorney General of California, of San Francisco, California, argued the cause and, with **John K. Van De Kamp,** Attorney General, **Richard B. Iglehart,** Chief Assistant Attorney General, **John H. Sugiyama,** Senior Assistant Attorney General, and **Clifford K. Thompson, Jr.** and **Morris Beatus,** Deputy Attorneys General, filed briefs for petitioner:

The respondent, who neither acquiesced in a show of authority nor was physically restrained by police officers, was not seized under the Fourth Amendment.

The respondent's abandonment of his cocaine was not fruit of the poisonous tree.

Clifford M. Sloan, of the Department of Justice, Washington, D.C., argued the cause and, with Solicitor General **Kenneth W. Starr,** Assistant Attorney General **Robert S. Mueller, III,** Deputy Solicitor General **William C. Bryson,** and **Paul J. Larkin, Jr.,** all also of the Department of Justice, Washington, D.C., filed a brief for the United States as amicus curiae urging reversal:

Respondent had not been "seized" for purposes of the Fourth Amendment when he discarded the cocaine.

The cocaine respondent discarded during his flight from the officers should be admitted even if respondent had previously been unlawfully seized.

James L. Lozenski, of Berkeley, California, by appointment of the court, 498 US 935, 112 L Ed 2d 302, 111 S Ct 336, argued the cause and, with **J. Bradley O'Connell,** of San Francisco, California, filed a brief for respondent:

Hodari was siezed under the Fourth Amendment.

The discarded contraband was fruit of the poisonous tree under Wong Sun v United States, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407, and Brown v Illinois, 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254.

Kent S. Scheidegger and **Charles L. Hobson** filed a brief for the Criminal Justice Legal Foundation as amicus curiae urging reversal; and **John D. O'Hair,** pro se, and **Timothy A. Baughman** filed a brief for the Wayne County Prosecuting Attorney as amicus curiae urging reversal.

Paul L. Gabbert filed a brief for California Attorneys for Criminal Justice as amicus curiae urging affirmance; and **Paul Morris** filed a brief for the National Association of Criminal Defense Lawyers as amicus curiae urging affirmance.

Ira Reiner and **Harry B. Sondheim** filed a brief for the Appellate Committee of the California District Attorneys Association as amicus curiae; and **Marvin Cahn** filed a brief pro se as amicus curiae.

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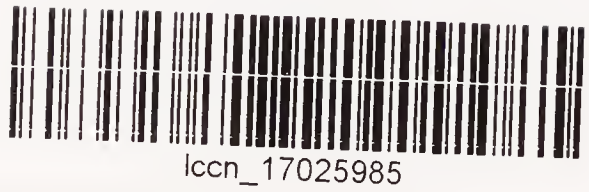
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